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Supreme Court of the United States

OCTOBER TERM, 1966

No. 1095

In the Matter of the Application of THE CITY OF NEW YORK relative to acquiring title to certain real property designated as Lot 10 in Block 439, etc. (5 parcels, Manhattan)—FIFTH AVENUE COACH LINES, INC., and four other proceedings.

FIFTH AVENUE COACH LINES, INC.,
SURFACE TRANSIT INC.,

Appellants,

—v.—

THE CITY OF NEW YORK,

Respondent.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

JURISDICTIONAL STATEMENT OF APPELLANTS

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SURFACE TRANSIT INC.,

Appellants,

—v.—

THE CITY OF NEW YORK,

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ON APPEAL FROM THE NEW YORK COURT OF APPEALS

JURISDICTIONAL STATEMENT OF APPELLANTS

This is an appeal from a final judgment* awarding Appellants Fifth Avenue Coach Lines, Inc. and Surface Transit Inc. (hereinafter sometimes "Fifth" and "Surface" individually and "Claimants" collectively) $30,353,542 plus interest at 4% per annum for all tangible assets necessary to Appellants' functioning as operating bus companies. Such assets were seized on March 21, March 22,

* A copy of the final judgment is annexed hereto as Appendix A.

March 27, and May 29, 1962, by the City of New York in proceedings which commenced on those dates. The final judgment was entered on October 11, 1966, pursuant to an order of the Court of Appeals of the State of New York, which modified an order of the Appellate Division which in turn had affirmed a final decree of Special Term. The Notice of Appeal to this Court was filed on December 27, 1966.

Pursuant to the order of the Court of Appeals the amount awarded bore interest at the rate of 4% per annum from the dates of vesting of title to the condemned property in the City of New York. On October 17, and October 18, 1966, Fifth and Surface were paid the amount of the judgment, less certain deductions representing payments made to equipment mortgagees of their property on December 11, 1964.

Claimants submit this Jurisdictional Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

Opinions Below

The opinions of the New York Court of Appeals are reported at 18 N.Y.2d 212 (1966), and 18 N.Y.2d 741 (1966). The opinion of the Appellate Division is reported at 23 App. Div.2d 463 (1st Dep't 1965). The opinion of Special Term is reported at 46 Misc.2d 14 (Sup.Ct. N.Y. County 1964).*

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* Copies of these opinions are attached hereto as Appendices B, C, D and E, respectively. The opinion at Special Term after hearing on objections (not officially reported) is attached as Appendix F.

Jurisdiction

By this appeal, Appellants contend that New York General Municipal Law § 3-a (McKinney 1965), as applied by the courts of New York State, violates the due process clause of the Fourteenth Amendment of the Constitution of the United States. This contention was raised before, and rejected by, each of the lower courts.

The jurisdiction of the Supreme Court to review this case by appeal is conferred by Title 28, United States Code, § 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Central R. Co. of Pa.* v. *Com. of Pa.*, 370 U.S. 607 (1962); *Marcus* v. *Search Warrants of Property at 104 East Tenth St., Kansas City, Mo.*, 367 U.S. 717 (1961); *Dahnke-Walker Co.* v. *Bondurant*, 257 U.S. 282 (1921); *Miller* v. *Schoene*, 276 U.S. 272 (1927); *Blodgett* v. *Silberman*, 277 U.S. 1 (1928); *Schroeder* v. *City of New York*, 371 U.S. 208 (1962).

Question Presented

Whether, in view of then current interest rates, the holding that New York General Municipal Law § 3-a (McKinney 1965) (which provides for four percent [4%] annual interest on a judgment in condemnation) precluded Appellants from showing that the said 4% statutory interest rate would not compensate them for the delay in payment of the award, violated the Fourteenth Amendment's prohibition against deprivation of property without due process of law.

Statute Involved

New York General Municipal Law § 3-a (McKinney 1965) provides as follows:

> "§ 3-a *Rate of interest on judgments and accrued claims against municipal corporations*
>
> "1. Except as provided in subdivision two of this section, the rate of interest to be paid by a municipal corporation upon any judgment or accrued claim against the municipal corporation shall not exceed three per centum per annum. 2. The rate of interest to be paid upon any judgment or accrued claim against the municipal corporation arising out of condemnation proceedings or action to recover damages for wrongful death shall not exceed four per centum per annum. 3. The term 'municipal corporation' as used in this section shall mean and include a city, county, village, town, school district, a special or public district organized for the purpose of financing the costs of public improvements or a pension or retirement system supported in whole or in part by any such city, county, village, town, school district or special or public district. Added L. 1939, c. 594; amended L. 1942, c. 842; L. 1956, c. 691, eff. July 1, 1956."

Statement

Appellants submit that the application of New York General Municipal Law § 3-a (McKinney 1965) to this case so as to preclude them from showing that the statutory interest rate of 4% per annum of the judgment in condemnation is not adequate compensation for the 4½-year delay in pay-

ment of such award amounts to deprivation of property without due process of law. Appellants further submit that a state statute relating to interest on awards in condemnation may provide at most a rebuttable presumption as to the damages resulting from delay in payment but may not preclude a condemnee from showing that actual loss exceeded the statutory rate.

Appellants are the two companies which, prior to March 21, 1962, provided virtually all bus transportation in the Boroughs of Manhattan and The Bronx in New York City. Pursuant to New York Laws of 1962, ch. 161, five proceedings were commenced and subsequently consolidated in the Supreme Court, New York County, by the City of New York to condemn all real and personal property necessary to Claimants' functioning as operating companies. For such property, Appellants were awarded $30,353,542 with interest thereon of 4% per annum. All evidence offered by Claimants to show that interest of 4% per annum on the award was not adequate to compensate them for delay in payment was excluded (13550-83).*

Claimants had offered two categories of proof to show such inadequacy: first, although all Claimants' property was condemned they were left with the obligations of a going concern.** Claimants offered to show that, in numerous instances, they had to pay interest at rates in excess of 4% per annum. The annual rates paid on Claimants'

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* Unless otherwise indicated, numbers in parentheses refer to pages of the transcript in the record on this appeal.

** Thus, even after condemnation Claimants were required to continue to discharge the following liabilities attributable to their operations as going concerns prior to condemnation:

(footnote continued on next page)

outstanding obligations ranged from 4½% to 9% (13550-60). Claimants were required to borrow at these rates because they had not received any payment whatever until more than 4½ years after the City had taken possession of their property. Second, Claimants offered to prove that in the then current money market, 4% interest per annum was not adequate compensation for the delay in payment. For example, they offered to show that as of the date of condemnation, the bank rate on loans to ordinary borrowers, to prime borrowers on mortgage loans secured by the FHA, on tax-exempt municipals, and on some form of United States Treasury Bonds, were all in excess of 4% (13550-60). The trial court rejected both such offers of proof as irrelevant, relying on *Matter of City of New York (Lincoln Square Slum Clearance Project)*, 22 Misc.2d 609 (1959), as affirmed in *Matter of City of New York*, 15 App. Div.2d 153, 178-82 (1st Dep't 1961). Thus, it stated:

> "INTEREST ON THE AWARDS should be computed at 4% (see opinion BOTEIN, P.J., in *Matter of City of New York [Maxwell]*, 15 A D 2d 153, 178-182)." 46 Misc. 2d at p. 44.

	Fifth	*Surface*
Pensions (12997-13105)	$2,734,107	$ 6,706,617
Workmen's Comp. (8341-8370)	455,014	181,290
Tort Claim Administration (8092-8190)	2,193,000	2,107,000
Cost of insuring liability to New York City arising from presence of street railway tracks (13328-13355)	—	3,500,000
Cost of repair of street railroad area (13392-13502)	—	1,680,000
	$5,382,121	$14,174,917

In the cited *Maxwell* opinion the Appellate Division had stated (pp. 181-82):

> "Claimants' motion at Special Term was for permission to adduce the evidence which in *Bronx Riv. Parkway* was lacking. To that end they submitted an affidavit of counsel stating that 6% per annum is factually the fair rate of interest for the use of money in the open money market in New York City where money is borrowed without collateral and where the lender does not receive income tax exemption, both State and Federal; that the largest corporations have not been able to borrow at 4% per annum or less; that the prime interest rate in New York City as announced by three leading banks is 4½%; and that claimants have been unable to obtain 5% loans even when secured by government obligations. But these statements and others of like purport, if proven, would not overcome the presumptive applicability of section 3-a. What Special Term did, with complete fairness and wisdom in our opinion, was to adopt an interest rate which common knowledge tells us reflects a reasonable balance between return and safety. The objective of courts in eminent domain proceedings is to do substantial justice (*Hamersley* v. *Mayor of City of N.Y.*, 56 N.Y. 533, 538; *United States* v. *Miller*, 317 U.S. 369, 375; *United States* v. *Cors*, 337 U.S. 325, 332); 'to see that it is just, not merely to the individual whose property is taken, but to the public which is to pay for it' (*Searl* v. *School Dist., Lake County*, 133 U.S. 553, 562; see, also, *New York, Ontario & Western Ry. Co.* v. *Livingston*, 238 N.Y. 300, 306). And the 4% rate, which commended itself to the practical judgment of

> the Legislature as a maximum, seems to us a median which cannot seriously be questioned as substantially just (cf. *Hartford Nat. Bank & Trust Co.* v. *Drew & Co.*, 188 F. Supp. 347, 349, affd. 290 F.2d 589; Mass. L.Q., Dec., 1960, p. 53)." 15 App.Div.2d at pp. 181-82.

In their briefs to the Appellate Division and the Court of Appeals of the State of New York, Claimants again raised the federal question of the constitutionality of New York General Municipal Law § 3-a (McKinney 1965) as applied to this case. The opinions herein by the Appellate Division and the Court of Appeals affirmed Special Term's reliance on *Maxwell* but did not set forth the grounds for rejection of Appellants' contentions.

The Question Is Substantial

Even after the opinion in the Court of Appeals, the City continued to refuse to pay Claimants any part of the award in condemnation. Accordingly, at that time, Claimants moved that the Court of Appeals amend its remittitur so as to direct the City to make immediate payment. In granting that motion, the Court of Appeals stated (18 N.Y.2d 741, 743):

> "The city's continued resistance to payment on alleged statutory grounds—four years after the taking—borders on the verge of giving the amendment of 1962 [New York Laws of 1962, ch. 161, authorizing the City of New York to condemn Claimants' property] an unconstitutional construction (*Rexford* v. *Knight*, 11 NY 308 [1854]; *Kahlen* v. *State of New York*, 223 NY 383, 389 [1918] . . . ."

By so stating, the Court of Appeals implicitly recognized that interest at the rate of 4% per annum was inadequate to compensate Claimants for delay in payment of the award. For there is nothing unconstitutional in delaying payment on alleged statutory grounds so long as adequate compensation is given for the losses caused by such delay.

Similarly, other New York courts have recognized the inadequacy of 4% per annum simple interest as compensation for delay in payment of awards in condemnation. In *Matter of Port Authority, Trans-Hudson Corporation*, 50 Misc.2d 613 (Sup. Ct. N.Y. County 1966), *modified*, 27 App.Div.2d 32 (1st Dep't 1966), a proceeding in which the New York Port Authority condemned the underground subway system which carries millions of passengers annually between New York City and New Jersey, the court stated with respect to the 4% rate there applicable (50 Misc.2d at p. 616):

> "The judgment of the New York Legislature of 1939 read in the statute cannot forever remain immutable. After the lapse of many years and firm proof showing a marked and continuing rise in interest rate throughout the country, it is and can be seriously questioned as constitutionally valid. No State may interfere with or prejudice the right to just compensation, including the right to additional compensation for any delay in making payment (*Matter of City of New York* [*Schnurmacher*], 16 NY2d 497 [1965]).
>
> "Of the several years involved here, the proof is satisfactory only as to the year 1966 in establishing the statutorily prescribed 4% interest to be unjust. This is not enough to warrant a departure from the interest rate currently approved by the latest decisions

> of the New York appellate courts. What can or may be done in the matter if several years more elapse before payment and the general market rate of interest continues at its present or even higher levels, the court need not venture to say. In any event, a reconsideration of the statute by the Legislature may well be in order."

The Appellate Division, in reviewing the same case, stated (27 App. Div.2d at p. 49):

> "Interest rates have increased generally and even the 4% provided by New York statute is outdated, unrealistic and unfair."

The established rule under the constitutional guarantee of just compensation is that the owner of condemned property, possession of which is taken before ascertainment and payment of just compensation, must receive the value of his property "at the time of the taking *plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking.*" *United States v. Klamath Indians,* 304 U.S. 119, 123 (1938). (Emphasis added.) *Accord: Jacobs* v. *United States,* 290 U.S. 13, 17 (1933); *Phelps* v. *United States,* 274 U.S. 341, 344 (1927); *Seaboard Air Line Ry.* v. *United States,* 271 U.S. 299, 306 (1923); *United States* v. *Rogers,* 255 U.S. 163, 169-70 (1921).

The additional sum has been measured in terms of interest, but is not added *qua* interest. Rather it is simply a *measure* of the value of the delay in receiving payment for the property taken. *United States* v. *Certain Land in City of St. Louis, Mo.,* 41 F.Supp. 809, 812 (E.D. Mo., 1941);

Gitlin v. *Pennsylvania Turnpike Authority*, 284 Pa. 324 (Pa. Sup. Ct. 1956); *Arkansas-Missouri Power Co.* v. *Hamlin*, 288 S.W.2d 14 (Mo. Ct. App. 1956). As the court in *Gitlin* v. *Pennsylvania Turnpike Authority, supra* (p. 332), said:

> "Damage for delay in payment of the property value is not interest. While measured by a rate per cent, it is recoverable as damages and not as interest."

The courts may not ignore their constitutional duty to determine just compensation with the assertion that "a reconsideration of the statute by the Legislature may well be in order." *Matter of Port Authority, Trans-Hudson Corporation, supra*, at p. 616. The allowance of compensation for all property taken in condemnation "is a judicial, and not a legislative question." *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 327 (1892).

Interest is "allowed, not by virtue of state statute but as constituting a part of the just compensation safeguarded by the Constitution." *Seaboard Air Line Ry.* v. *United States, supra*, at p. 305. See, also, *Jacobs* v. *United States, supra*. We agree that a statutory interest rate may sometimes be applied. However, where one has been applied, the following factors were present: offers of proof of actual loss were not made; the interest awarded was far in excess of 4%, and was awarded in times when the prevailing interest rates were considerably below present levels.* See *United States* v. *Sargent*, 162 Fed. 81 (1908) (6%);

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* In the *Matter of Port Authority, Trans-Hudson Corporation, supra*, the condemnee showed the marked increase in rates of interest on various classes of obligations in the last thirty years. (See Appendix G, setting forth Exhibit EA-1 from the *Trans-Hudson* case.)

United States v. *Rogers*, 255 U.S. 163 (1921) (6%); *Seaboard Air Line Ry.* v. *United States*, *supra* (7%); *United States* v. *Certain Tracts*, 47 F. Supp. 30 (S.D. Ga. 1942) (7%).

The holding by the New York Court of Appeals herein that the New York General Municipal Law § 3-a (McKinney 1965) (which provides for 4% interest on awards in condemnation) precludes a showing of actual damages for delay in payment is in direct contravention of its constitutional duty to make a judicial determination of just compensation for the delay in payment.

Nor can an offer of proof of the inadequacy of a statutory interest rate be rejected on the ground that the condemnor is a "favored debtor". Thus, in *Matter of City of New York (Maxwell)*, *supra*, relied upon by Special Term herein, the court erroneously said (15 App. Div.2d at p. 182):

> "Furthermore, section 3-a, a constitutional enactment, has made municipalities 'favored debtors'. The record reveals no offer of proof that the 4% rate unduly favors them."

Whether or not the condemnor is a favored debtor in ordinary commercial transactions is not a factor in determining just compensation for the use of the property prior to payment, because "the question of just compensation is not determined by the value to the government which takes, but the value to the individual from whom the property is taken . . . ." *Monongahela Navigation Co.* v. *United States*, *supra*, at p. 343. This is the universally accepted rule. See 3 *Nichols, The Law of Eminent Domain* § 8.61, pp. 49-50 (3d ed. 1965), and cases there cited. Moreover,

even this so-called "favored debtor" paid net interest rates in excess of four per cent.*

In this case the New York courts have sanctioned a result which even a favored borrower could not have accomplished, namely, borrowing money at a rate of 4%. New York City has thereby made a profit by the delay and in effect has decreased the actual award. The loss suffered by Claimants due to this delay necessarily exceeds the City's profit because Claimants are not favored debtors.**

The New York State Legislature has recently become aware of the inequity of a 4% rate of interest with respect to property condemned by the State of New York. In February 1966 the Governor's Committee on Land Acquisition Law and Procedures submitted its report in which it recommended that the rate of interest on condemnation awards be increased, stating (pp. 162-63):

> "At the present time the statutory rate of interest established in the State Finance Law payable upon claims for appropriate land is 4%. The rate is outmoded and should be replaced by an interest rate far

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* This Court may take judicial notice of the fact that the City of New York has borrowed money at the following rates during 1966:
4.18% (*New York Times*, January 28, 1966, p. 1, col. 6, cont'd at p. 48, col. 6);
4.24% (*Id.*, April 29, 1966, p. 1, col. 6, cont'd at p. 24, col. 3);
4.65% (*Id.*, July 27, 1966, p. 28, col. 1); and
4.76% (*Id.*, October 26, 1966, p. 1, col. 5, cont'd at p. 94, col. 1).

** This Court may take judicial notice of the rapid increase in interest rates in recent years. For example, the prime rate of interest in the United States was 6% from August 18, 1966 to and beyond the date of payment of the judgment in this case, October 17 and October 18, 1966. See *New York Times*, January 1, 1967, p. 70, col. 4, and January 31, 1967, p. 82, col. 4.

more in keeping with today's financial facts of life, particularly where a claimant has to wait a considerable time before he obtained the value of the property appropriated, or where he has lost income-producing property. The money market calls for at least 6%. The Federal Government pays 6%, and there appears to be no justification for the State to pay less interest than that paid by the United States."

As a result, the Legislature amended the State Finance Law effective August 1, 1966 to provide as follows:

"The rate of interest to be paid by the state upon any judgment or accrued claim against the state shall not exceed four per centum per annum; *provided, however that the interest to be paid by the state upon any judgment or accrued claim against the state arising from the acquisition of real property by appropriation shall not exceed six per centum per annum.* As amended L. 1966, c. 921, eff. Aug. 1, 1966." (Emphasis added.) New York State Finance Law, § 16.

The Court undoubtedly is aware of the magnitude of the exercise of the power of eminent domain. During 1960-1964, New York City *alone* condemned over $370,000,000 worth of property. [1960-1964] CITY OF NEW YORK LAW DEPARTMENT REPORT at 24. As the award here was in excess of $30,000,000 and was finally paid to the condemnee 4½ years after title vested in the City of New York, for each 1% of the award per year assessed for the delay in payment ($300,000), Claimants would receive more than $1,350,000. There are approximately 2,380 stockholders of Fifth Avenue Coach Lines, Inc., who are vitally interested and affected by this holding.

CONCLUSION

At issue in this proceeding is the right of the sovereign to appropriate the use of the proceeds of property without the constitutional safeguards applicable to the appropriation of the property itself. No argument would be necessary to establish that the City of New York could not, during periods of high interest rates, constitutionally condemn a 4½-year use of $30,000,000 of *cash* and pay only 4% per annum simple (not compound) interest. Fundamentally, this case presents no different issue. Is the value of the use of money protected by the Constitution? If it is not, then property itself is not protected because property has no greater value than its use.

For the foregoing reasons, we believe that the question presented on this appeal is substantial and of public importance.

Respectfully submitted,

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APPENDIX A

Judgment Appealed From

(Caption omitted)

The claimant, Fifth Avenue Coach Lines, Inc., having appealed to the Court of Appeals from the order of the Appellate Division, First Department, entered in the office of the Clerk of said Appellate Division on the 22nd day of July, 1965, affirming the Third Separate and Partial Final Decree of the Supreme Court, New York County, entered on October 16, 1964, and the claimant Surface Transit, Inc. having appealed to the Court of Appeals from the order of the Appellate Division, First Department, entered in the office of the Clerk of said Appellate Division on the 22nd day of July, 1965, affirming the Fourth Separate and Partial Final Decree of the Supreme Court, New York County, entered on October 16, 1964, and The City of New York having cross-appealed therefrom, and the said appeals having come on to be heard before the said Court of Appeals and the said Court having duly made an order which modified the order of the Appellate Division of the Supreme Court, and, as so modified affirmed such order with costs to the claimants, and remitted the proceeding to Special Term for a determination of the value of the going concern assets as an addition to the amount theretofore awarded, a copy of which, together with the record on appeal was remitted to and filed in the office of the Clerk of the County of New York on the 22nd day of August, 1966, and the costs and disbursements of claimant Fifth Avenue Coach Lines, Inc. having been duly taxed in the sum of $1,171.09, and the remittitur herein having

been recalled and amended so as to provide for entry of final judgment for the value of the tangible assets and for the severance of further proceedings for determination of the value of the going concern assets as an addition to the amount theretofore awarded, and said amended remittitur having been filed in the office of the Clerk of the County of New York on the 3rd day of October, 1966.

NOW, on motion of J. LEE RANKIN, attorney for The City of New York, it is

1. ORDERED AND ADJUDGED that the order of the Court of Appeals be and the same hereby is made the order of this Court, and it is further

2. ORDERED AND ADJUDGED, that the order entered herein on the 22nd day of July, 1965, be and the same hereby is in all things modified; and it is further

3. ORDERED AND ADJUDGED that the amounts awarded for the tangible property be severed from the issues remaining with respect to the value of the intangible property, and it is further

4. ORDERED AND ADJUDGED, that claimant Fifth Avenue Coach Lines, Inc., 598 Madison Avenue, New York City, New York, recover of the City of New York, Municipal Building, New York City for the value of its tangible property taken, the sum of $14,895,015.70 with lawful interest from the date of vesting, together with the sum of $1,171.09, costs and disbursements as taxed, and it is further

ORDERED AND ADJUDGED, that the claimant Surface Transit, Inc., 598 Madison Avenue, New York City, New York, re-

cover of the City of New York, Municipal Building, New York City, New York for the value of its tangible property taken, the sum of $12,768,530.40, with lawful interest from the date of vesting, and it is further

ADJUDGED that the Clerk of this Court enter judgment accordingly.

Dated, October 11, 1966

WILLIAM C. HECHT, JR.
Justice Supreme Court
1st Judicial District

JAMES McGURRIN
Clerk

APPENDIX B

Opinion of the Court of Appeals

(Caption omitted)

BURKE, J.

The only issue presented on this appeal which calls for a modification is the reliance of the courts below on erroneous principles of law regarding the evaluation of the condemnees' intangible property. The theory relied upon is unrealistic, resulting in the denial of the just compensation to which claimants are entitled under the Constitution. The present award is sufficient only as compensation for the value of the tangible property taken.

The problems raised in this condemnation proceeding are difficult and to a degree unique. In this era of spiraling inflation such proceedings will continually reoccur since it is beyond the resources of private enterprise to provide mass transportation at modest rates, dictated by political exigencies and confiscatory as far as the equity in the business is concerned. However, "It does not rest with the public, taking the property, through Congress or the Legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation." (*Monongahela Nav. Co.* v. *United States,* 148 U. S. 312, 327 [1893]; *Railway Steel Spring Co.* v. *Chicago & E. I. R. Co.,* 261 F. 690 [U. S. Dist. Ct., N. D., Ill., 1919]; *Matter of City of New York,* 190 N. Y. 350, 353 [1907].) However laudable the political motivation is in depriving claimants of their transportation system, they must be fully compensated therefor. In *Matter of New York Edison Co.*

v. *Maltbie,* 244 App. Div. 436, 442 [3d Dept., 1935] the court stated: "This announcement indicates a motive to be generous toward needy rate payers with the money and property belonging to the utility companies. Some may regard this as desirable and the motive as praiseworthy, but 'the point is not one of motives but of constitutional authority, for which the best of motives is not a substitute.' *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 420 * * *.)"

The right to a reasonable fare is part of all franchise contracts. (*People ex rel. City of New York* v. *Nixon,* 229 N. Y. 356 [1920].) As this court stated in *People ex rel. Kings County Light Co.* v. *Willcox,* 210 N. Y. 479, 491 [1914]: "The right to limit the corporation to a fair return fixed by public authority necessarily involves the correlative right in the corporation to be assured of that fair return during all the time that its capital is employed in the public service." In *Matter of Queens-Nassau Tr. Lines* v. *Maltbie,* 186 Misc. 424 [Sup. Ct. Albany County, 1946], affd. 271 App. Div. 81 [3d Dept., 1946], affd. without opn. 296 N. Y. 893, 894, 896, 898, 899, 901 [1947], the court held that the Public Service Commission had jurisdiction over omnibus rates and accordingly was bound to permit claimants to charge a reasonable and compensatory fare notwithstanding any contrary provisions contained in the franchise agreements. The predecessors of claimants herein were parties to Maltbie and the franchise contracts herein were among those there in issue. Thus fare increases were granted to claimants by the Public Service Commission in 1948 and 1949. The Public Service Commission stated in *Matter of Lester T. Doyle, Trustee* (11 PUR 3d 491, 497-498 [N. Y. Pub. Serv. Comm., 1956]):

"We do not fix the rates of this system [the Third Avenue system] as a whole. Except for the relatively minor operations in Westchester county they are fixed by the city of New York. The applicable statute imposes the same duties upon the city as upon the commission. Rates for bus companies under the Public Service Law, Consol. Laws, c. 48, § (63-b) are based upon capital actually expended. The city of New York stated on the argument before us that it is the intention of the city to treat the company fairly and to adjust its rates to meet its needs. Since that time the city has acted to keep this commitment."

After the rate regulating authority was transferred to the city the Board of Estimate granted the following increases in fares to claimants:

7/1/50	New York City Omnibus	7¢ to 8¢
7/1/50	Surface Transportation	8¢ to 10¢
1/1/51	New York City Omnibus	8¢ to 10¢
1/1/54	Surface Transportation	10¢ to 13¢
1/1/54	Fifth Avenue	12¢ to 15¢
1/1/54	New York City Omnibus	10¢ to 13¢
1/1/56	Surface Transportation	13¢ to 15¢
1/1/56	New York City Omnibus	13¢ to 15¢

Hence it is clear that the statute did not constitutionally deprive claimants of their previously existing right to reasonable fares, but placed the duty to respect such rights upon the city acting either as a regulatory body or as a contracting party.

The claimants operated the nation's two largest privately owned transit systems. Fifth operated 28 routes in Manhattan for an annual total of 22,000,000 revenue

bus miles. Surface operated 49 routes in Manhattan and The Bronx for over 24,000,000 revenue bus miles per year. Surface provided all the surface transportation by public carrier in The Bronx except for a minor Transit Authority service over the Whitestone Bridge. Fifth provided virtually all the franchised surface transit in Manhattan. Each working day of the year they transported about 1,250,000 passengers. The transit system served a major portion of the largest city and the best transit market in the United States. To some degree this bountiful market results from the fact that the per capital ownership of automobiles in New York County and Bronx County, the two areas served by claimants, is lower than in any other major urban county in the United States. It follows, therefore, that the respondent took the claimants' transit systems as going concerns and has operated them as such ever since. The maintenance by the city of this transportation service demonstrates that the bus system is essential and complementary to, not competitive with, the overcrowded, inadequate subway system.

In fixing the award at $30,353,542 the trial court used reproduction cost new less depreciation, but the court improperly rejected the evidence proffered by the claimants as to the value of the intangible going concern assets, that is, the component of value in the business which in addition to the value of the tangible assets reflects an efficient operation. In disallowing pensions, mortgages, Federal and city taxes, equipment and bond indebtedness, all current obligations in excess of $19,000,000 the trial court treated the take over as one of a going concern, These, of course, are the usual debts which are paid for out of

the earnings of a going concern and similar debts are normally incurred by the going concern in the course of its continuing business. But there is a basic inconsistency in then applying a principle that no payment for seized going concern assets should be made when the continuance of earnings is shut off by condemnation. The reason given below is that where there is no earning capacity even if only because the rates permitted to be charged are unreasonably low, there is no going concern value. However, in all the cases supporting the view that where there is no earning capacity there is no going concern value, the condemnees were inherently incapable of profitable operation because of the economic law of diminishing returns or inefficient management. Here had the city not suppressed the earning power of these transit lines by denying them, for political reasons, the right to charge an increased and reasonable fare, they would have had large gains in gross revenues and greater gains in net profits as going concerns at the time of condemnation.

This record shows that every recent rise in fare on claimants' lines resulted in increases in profits even while claimants experienced a slight decline in passengers carried. The general experience in the transit industry in the United States has followed a pattern that for every 10% increase in fare there is only a 3% loss in traffic. Accordingly the increase in revenue attributable to a fare rise far outbalances the decrease in revenue attributable to a concomitant passenger loss. Indeed the Transit Authority stated with respect to this nationwide pattern that "the average losses based on experiences in smaller cities are likely to be higher

than might be expected in N. Y. City where the automobile is probably not as serious a competitor."

Thus the record demonstrates claimants' capability for profitable operations under reasonable rates and they are, therefore, entitled to going concern value (*Kimball Laundry Co.* v. *United States*, 338 U. S. 1, 19 [1949]; *National Waterworks Co.* v. *Kansas City*, 62 F. 853 [C. C. A. 8th, 1894]; *People ex rel. Kings County Light Co.* v. *Willcox*, 210 N. Y. 479, *supra* [1914]).

The measure of value in this case is the cost of putting the entire transit systems together new plus all improvements, tangible and intangible, less depreciation. The cost of organizing and systematizing an enterprise in these days is many times the cost of a half a century ago. Consequently, the going concern's intangible assets are equally as essential to the city's ability to furnish bus service as are the tangible assets seized and used. These going concern attributes or so-called intangible assets such as coach routes, operating schedules, operating records and systems of procedures and trained personnel made it possible for the city to operate the transit system the day after the condemnation. Under the theory erroneously followed below, the assets in which the owners of the bus systems had invested substantial sums could be taken without compensation. These assets, without which the city would not have operated the system, can no more be taken without compensation than can its tangible corporate property.

In condemnation cases it is "necessary to appraise the physical property and the going value separately, and of course that is the case if the cost of reproduction rule be adopted." (*People ex rel. Kings County Light Co.* v. *Will-*

cox, 210 N. Y. 479, 492, *supra*.) The rule was well defined in *International Ry. Co.* v. *Prendergast*, 1 F. Supp. 623, 629 [U. S. Dist. Ct., W. D. N. Y., 1932]: "In obtaining reproduction cost new, the value of the business as complete and ready to begin operation is ascertained. There must be added a going value, the value of the plant not as it is ready to begin operation, but the additional value which accrues because the plant is in operation with customers acquired." Such increments for going concern value in addition to an award for tangible assets (valued at reproduction cost) must be allowed. (*Omaha* v. *Omaha Water Co.*, 218 U. S. 180, 191-192 [1910]; *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400 [1926]; *Georgia Ry.* v. *Railroad Comm.*, 262 U. S. 625 [1923]; *Bluefield Co.* v. *Public Serv. Comm.*, 262 U. S. 679, 686 [1923]; *Denver* v. *Denver Union Water Co.*, 246 U. S. 178, 191-192 [1918]; *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1 [1909]; *Los Angeles Gas & Elec. Corp.* v. *Railroad Comm.*, 58 F. 2d 256, 271 [U. S. Dist. Ct., S. D. Cal., 1932]; *Denver Union Stock Yard Co.* v. *United States*, 57 F. 2d 735, 744 [U. S. Dist. Ct., D. Col. 1932].) Indeed the majority of the court below recognized this and stated that the trial court had taken the going concern items into consideration in reaching its conclusion. In making this statement, the Appellate Division erred for it is clear that the trial court did not take the going concern items into account. In point of fact, it so indicated when, in the portion of its opinion devoted to "Going Concern Values" (46 Misc. 2d 14, 25 *et seq.*), it declared "No allowance may be made for Surface's operating rights and permits nor for Fifth's perpetual franchises for the reasons already stated in the

discussion of the *Nixon* case [229 N. Y. 356, *supra*]. The other items [coach routes, operating schedules, etc.] are not supported by the cases urged by claimants." (46 Misc. 2d, p. 26.) If there could be any doubt as to the meaning of this excerpt, it is dispelled by a reading of the entire discussion concerning going concern value, for it is plainly stated that the only award made was for the reproduction cost less depreciation. It follows therefore that no allowance was made for the going concern items.

And this is precisely the thrust of Justice Rabin's dissent (23 A. D. 2d 463, 468-469):

"While, in an attempt to reflect 'going value', the court appraised the real property, buses and other personal property on the basis of a depreciated reproduction cost rather than a 'break-up' market value, to my mind that does not fully reflect 'going value'. And I see no reason why the valuation should be so limited. The City's only expert witness on the subject of going value—Mr. Edward A. Roberts—authored a book entitled 'Fair Value, Going Value, et al. of a Bus Utility.' In this work he clearly indicates that giving 'reproduction cost new less depreciation' does not constitute compensation for 'going value'. He calls such compensation an award for merely the 'bare bones value of a business property'. I accept and agree with that statement of the city's expert.

"It should be noted that Mr. Roberts did not refer to 'break-up' value as being 'bare bones' value. He was referring to value arrived at through the 'reproduction costs new less depreciation' method as being 'bare bones' value. And that is all that Special Term gave. And that is exactly what the City's expert said does *not* constitute going value."

The argument made by the respondent that going concern value should not be allowed where the court found an inadequate plant, dwindling profits and poor future prospects was made long ago and rejected (See *Matter of City of New York* [*New York Water Serv. Corp.*], 275 App. Div. 785 [2d Dept., 1949], mot. for lv. to app. den. 299 N. Y. 797 [1949].) In the *New York Water Serv. Corp.* case, which involved the condemnation of the Flatbush water supply, where that identical contention was advanced, the Appellate Division approved an allowance for going concern value in addition to compensation for tangible assets valued at reproduction cost new less depreciation.

In the case before us, claimants' property was a viable operative transit system and was taken as such, with a clearly expressed intent to so operate it after the forced transfer of title. Despite its annual transportation of a half billion riders, it had been approved by the city for eight years as safe and adequate. Claimants' undeniably competent and efficient personnel were taken over by the city along with claimants' routes, franchises, operating schedules, accounting and maintenance records, etc.—all going concern assets for which claimants must be duly compensated.

Accordingly the order appealed from should be modified, the matter remanded to Special Term for a determination of the value of the going concern assets as an addition to the amount heretofore awarded and, as so modified, affirmed, with costs.

KEATING, J. (dissenting).

When private property is taken for public use, our State and Federal Constitutions alike mandate the payment of

"just compensation" (N. Y. Const., art. I, § 7; U. S. Const., 5th Amdt.). They do not require the payment of a windfall, nor, in arriving at "just compensation", do they require the courts to ignore the economic and political realities which faced the condemnees in the course of their normal existence during the many years preceding condemnation.

Much as we may sympathize with the plight of an economically unfortunate corporate operation, we may not sweep that misfortune away in a condemnation proceeding by ignoring the causes which gave rise to it.

Our business is to arrive at "just compensation", no more and no less. Elusive as that concept may be at times (see *Banner Milling Co.* v. *State of New York,* 240 N. Y. 533, 546) there are, nonetheless, well established guidelines for us to follow.

First, it is axiomatic that the measure of compensation for property taken is the owner's loss and not the taker's gain (*Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189, 195; *Kimball Laundry Co.* v. *United States,* 338 U. S. 1, 5; *McGovern* v. *New York,* 229 U. S. 363). In its application to this case, this simply means that we must look to the value of what the condemnees have lost and not to the value of what the condemnor has gained.

Second and somewhat corollary to the above is the rule that the condemnees may not demand an artificial or inflated value based on the public need. This is commonly referred to as "hold-up" value and it is universally rejected as a measure of compensation (*Matter of Simmons,* 130 App. Div. 356, affd. 195 N. Y. 573, affd. *sub nom. McGovern* v. *New York,* 229 U. S. 363, *supra; United States* v. *Cors,* 337

U. S. 325, 333-334). However, this does not mean that the inherent value of the transit systems for public use must be disregarded. The properties here being condemned were, from the beginning, brought into existence by private interests to serve the public need for mass transportation. They served the public need on the date of condemnation and their facilities continue to do so today. To this limited extent they have and always have had a real value to the condemnees, which may be taken into consideration in arriving at a final award. This is clearly distinguishable from an inflated and artificial "hold-up" value which suddenly comes into being with the announced condemnation.

Thus, we come to the question of how we are to determine value to the condemnees. The usual formula is to determine what a willing buyer would pay to a willing seller in an arms' length transaction. Obviously, since every condemnation is, in effect, a forced sale, courts must make an informed judgment upon all the available evidence as to what a hypothetical willing buyer would probably pay to a hypothetical willing seller. This is precisely what the courts below said they were doing and, in fact, did.

The value of the tangible assets, buses, garages, real estate, fixtures and all other equipment, was considered. A buyer would pay for these and so too must the city.

In addition, there is real value attributable to the fact that these tangible assets are not isolated units. They are fully integrated and operating transit systems, held together by personnel available and working, franchises, operating schedules, established routes, accounting and maintenance records and all of the other elements which spell the difference between "bare bones" and a transporta-

tion system in operation. These are but elements of a "going concern" for which a buyer would willingly pay. The city, which took them, must pay for them and has paid for them rather generously. As elements of a business which have value, it is only proper that they should be considered part of the "just compensation" to which the condemnees are entitled and so the case law has consistently held (*Kimball Laundry Co.* v. *United States,* 338 U. S. 1, *supra; Banner Milling Co.* v. *State of New York,* 240 N. Y. 533, 544, *supra; Des Moines Gas Co.* v. *Des Moines,* 238 U. S. 153, 164-165; *Omaha* v. *Omaha Water Co.,* 218 U. S. 180, 202; *Denver* v. *Denver Union Water Co.,* 246 U. S. 178, 191).

The majority opinion states (p. 218) that "The present award is sufficient only as compensation for the value of the tangible property taken." This manifestly cannot be so. The final award as affirmed by the Appellate Division, was $30,353,542. The city, on its appeal to this court, claims that the award should not have exceeded $20,700,000.

To the extent that the claimants were integrated, synchronized and functioning operations, they were specifically compensated by Special Term (46 Misc 2d 14, 25). The Appellate Division recognized this (23 A D 2d 463, 467): "The break-up or 'bare bones' value of the physical assets, except perhaps for the real estate, would have been greatly less than the amount fixed by Special Term. Had claimants voluntarily discontinued operations and sought to sell their real estate and personalty, they would have been fortunate to realize the amount which the city on its cross appeals asserts should have been awarded—namely, two thirds of the award".

There cannot be any doubt but that the Appellate Division, in the exercise of its jurisdiction to review the facts, would not have sustained a $30,353,542 award for the physical assets alone, and there is no basis for our doing so in the first instance.

If we return now to our hypothetical buyer, we must ask, somewhat rhetorically, whether he would pay for something which he did not take, which he did not receive and which, in fact, neither existed nor had a potential for ever coming into existence. This crucial element is the ability to earn money, that most precious commodity which, in all but the case of a philanthropist or a unit of government, brings the buyer into the market place to begin with.

A willing buyer will pay substantial sums for a business which earns money. A business which does not and cannot be brought to the point at which it brings its owner a reasonable return on his investment has no "earnings" element of going-concern value (*Matter of City of New York,* 265 N. Y. 170, affd. *sub nom. Roberts* v. *New York City,* 295 U. S. 264; *Kimball Laundry Co.* v. *United States,* 338 U. S. 1, *supra*) for which a buyer will pay. In such a situation, no good reason appears why the city should have to pay for a non-existent element.

The evidence in this case abundantly establishes that, at the 15 cents fare per passenger, the claimant transit companies were not earning and were not capable of earning money. In 1961, the year preceding condemnation, claimant Fifth Avenue Coach Lines, Inc., had a deficit of $300,000 after taxes and claimant Surface Transit, Inc., had a net income of $90,000 after taxes. For the three years preceding condemnation, Fifth's average net income after taxes

was $27,000 and Surface's was $552,000. Average net operating income (pre-taxes) for the 10 years preceding condemnation was $3.2 millions for the two companies combined. These figures include $20 millions in subsidies to supplement the fare box in the seven years preceding condemnation.

In 1962, claimants' president wrote to the Board of Estimate that claimants "are in a serious and critical financial condition. Petitioners in 1961 had a loss of $721,410. The loss for January of 1962 is approximately $500,000. Based upon results thus far this year, petitioners estimate that they will have a loss in 1962, in excess of six million dollars."

The majority does not dispute these findings of fact made by both courts below. Rather, they recognize them, but insist, nonetheless, that the city must pay *as if* there were profits and this is on the theory that claimants had a *right* to make a profit (by raising the fare) and that "had the city not suppressed the earning power of these transit lines by denying them, for political reasons, the right to charge an increased and reasonable fare, they would have had large gains in gross revenues and greater gains in net profits as going concerns at the time of condemnation." (Pp. 220-221.)

In my view, neither of these arguments square with the facts or the applicable law.

We may note that as of this writing, four years after the taking in question, the transit fare has just been increased from 15 cents to 20 cents. Notwithstanding this recent increase, value in a condemnation proceeding is calculated

as of the date of the taking and not as of a future date four years later.

Political considerations, in this case the pocketbook of the millions of New Yorkers who use the transit system daily, are not to be shrugged off lightly. This was a fact of life with which the claimants were required to contend throughout their operating existence. The announcement of condemnation did not herald an end to their burden—at least it should not with regard to valuation. As Special Term said in respect to claimants' asserted right to be valued at a higher fare: "The complete answer is that, during the entire ten-year period while claimants' earnings before income taxes average only about $3.2 millions on a business alleged to be worth $92.5 millions, they had whatever right they now contend for, yet they failed to assert it. This must have been because they recognized that they could not overcome the practical or legal obstacles or both. They have not shown any greater chance of success at this time" (46 Misc 2d 14, 21).

Moreover, there is not the slightest iota of evidence to establish that the city suppressed the earning ability of these claimants in order to take them over at a lower cost. Just as the city may not depress value in contemplation of condemnation so, too, the claimants may not employ condemnation for the purpose of enhancing their own value (*Matter of City of New York* [*Inwood Hill Park*], 230 App. Div. 41, 43-44, 46-47, affd. 256 N. Y. 556).

Among the practical and legal obstacles to increased earnings are the circumstances that: (1) the franchises pursuant to which the claimants operated were nonexclusive and were in direct competition with the city's transit facili-

ties. 68% of Fifth's revenues and 62% of Surface's revenues were from routes competitive with the city's system and the claimants could not reasonably expect passengers to pay a higher fare on one than on the other; (2) the franchise agreements expressly reserved to the city the right of termination in the event fares were increased without the consent of the Board of Estimate. This alone is enough to prevent the claimants from asserting the right to be valued on the basis of a higher fare; and (3) as I have already noted, even the hypothetical *right* to a higher fare would not affect the award since it is the condemnees' earnings on the date of taking, rather than a speculative rate at a speculative date in the future, which are relevant. (*Olson* v. *United States,* 292 U. S. 246, 257.)

The claimants' asserted right to a higher fare in any event seems equally groundless. The ground upon which it is urged is that the city, which controls the fare by virtue of a transfer of jurisdiction to it from the Public Service Commission (Public Service Law, § 5-d), is obligated, as the new regulatory agency, to permit claimants to charge a compensatory fare.

Section 5-d of the Public Service Law provides in relevant part that "The rates of fare on any such omnibus lines shall be those established pursuant to any contract, franchise or consent heretofore or hereafter made between the omnibus corporations operating such lines and such city".

It is clear that the Legislature may withdraw the jurisdiction of a regulatory agency and leave the parties to the terms of their franchise agreement (*Matter of Village of Mamaroneck* v. *Public Serv. Comm.,* 208 App. Div. 330,

affd. 238 N. Y. 588) but, in the final analysis, that question is not controlling for, in fact, the claimants never asserted a *right* to a higher fare prior to condemnation, and they may not do so after condemnation has become a reality. Moreover, the claimants had no right to be free from the city's competition (*Hamilton Gas Light Co.* v. *Hamilton City,* 146 U. S. 258, 268) and the mere fact of regulation did not assure them of the right to make a profit (*Power Comm.* v. *Hope Gas Co.,* 320 U. S. 591, 603). The following quote from *Market St. Ry. Co.* v. *Comm.* (324 U. S. 548, 567) is relevant: "[I]t may be safely generalized that the due process clause never has been held by this Court to require a commission to fix rates on the present reproduction value of something no one would presently want to reproduce, or on the historical valuation of a property whose history and current financial statements showed the value no longer to exist, or on an investment after it has vanished, even if once prudently made • • • The due process clause has been applied to prevent governmental destruction of *existing* economic values. It has not and cannot be applied to insure values or to restore values that have been lost by the operation of economic forces." (Emphasis added.)

This, in substance, is the basis for my dissent. In no case that I have found have the courts required a condemnor to pay for something which was not taken and which did not exist. Condemnation requires "just compensation" but "just" has reference to condemnor as well as condemnee.

Where a profitable business is not taken and where it is shown that the business is not reasonably capable of profitable operation by reason of economic forces, no compensa-

tion may be allowed therefor (*Matter of City of New York*, 265 N. Y. 170, affd. *sub nom. Roberts* v. *New York City*, 295 U. S. 264, *supra; Matter of City of New York* [*Sixth Ave. El. R. R.*], 265 App. Div. 200, 206-207). Of course, in this connection it makes no difference at all that the claimants operated "the nations [sic] two largest privately owned transit systems." They would have been worth more with smaller systems and larger earnings. As Mr. Justice Cardozo said in *Roberts* v. *New York City* (*supra*, p. 282), "Substantial prices are not paid for the privilege of conducting a business at a loss."

Since I believe that at $30,353,542, the claimants have already received far in excess of that which they could have reasonably anticipated from a willing purchaser, I think they are entitled to no more for nonexistent profit potential.

Accordingly, I would affirm the orders of the Appellate Division.

Judges Fuld, Van Voorhis and Scileppi concur with Judge Burke; Judge Keating dissents in an opinion in which Chief Judge Desmond and Judge Bergan concur.

Order modified and, as so modified, affirmed, with costs to claimants, and case remitted to Special Term for further proceedings in accordance with the opinion herein.

APPENDIX C

Opinion of the Court of Appeals on Motion to Amend Remittitur

(Caption omitted)

MEMORANDUM:

Motion of claimants to amend the remittitur granted. Return of remittitur requested, and, when returned, it will be amended as follows:

Order modified, and, as so modified, affirmed, with costs to the claimants, and the case remitted to Special Term for entry of final judgments for the amounts heretofore awarded for the tangible assets and for further proceedings in accordance with the opinion heretofore rendered, such proceedings to be severed from all prior proceedings had herein.

By its opinion, this court made it clear that the claimants were entitled to immediate payment of the award made below for the tangible property taken and that there was to be a further hearing with respect to the additional award for "going concern" value to which we held the claimants were also entitled. In view of the city's contention that section B15-21.0 of the Administrative Code prevents the entry of a separate partial decree directing payment of the award already made, we find it necessary to grant the claimants' motion to amend our remittitur and make even more explicit our meaning.

It is enough to point out that the Administrative Code provision relied upon by the city has no application to the case before us.

Appendix C cont'd

Section B15-21.0 of the Administrative Code does not bar, as the city contends, the entry of a judgment directing payment of the award for the tangible assets. The 1962 amendment to General City Law (art. 2-A, § 20), pursuant to which this transit system was taken, provides that "Except as herein otherwise prescribed, the procedure for ascertainment of the compensation to be paid to the owners of *property and franchises*, if any, so acquired shall be, *so far as practicable*, the procedure governing the acquisition by such city of real property located in such city." (Emphasis added.)

The only section of the Administrative Code which prevents a court from rendering a separate and partial decree is section B15-21.0. But that provision is expressly limited to "real property" and, in practice, rests upon the entire taking being "subdivided into parcels" (subd. b). Obviously, buses and going concern values which are related to buses, personnel, real estate, franchises, etc., cannot be so "subdivided." It is self-evident, therefore, that section B15-21.0 was never designed for and is simply not applicable to the taking before us.

On the other hand, claimants should not be denied a separate partial judgment in the present proceeding, for to do so would unnecessarily delay payment of an award already held to be due and owing and would thereby impose upon claimants an undue hardship. When the validity of the 1962 amendment was considered in a prior proceeding, the city assured this court that (1) the amendment was constitutional because it provided for "certain and prompt * * * payment of just compensation", and that

(2) such constitutional mandate would be complied with. (*Fifth Ave. Coach Lines* v. *City of New York,* 11 NY2d 342, 343 [1962].) The city's continued resistance to payment on alleged statutory grounds—four years after the taking—borders on the verge of giving the amendment of 1962 an unconstitutional construction (*Rexford* v. *Knight,* 11 NY 308 [1854]; *Kahlen* v. *State of New York,* 223 NY 383, 389 [1918]) and it is directly contrary to the representation given to this court that prompt payment would be made.

Accordingly, judgment reflecting the award for the tangible assets should now be entered and payment therefor made, subject, of course, to any lawful claims existing against such award. Only by making adequate provision for prompt payment without unreasonable delay do we ensure that the taking does not contravene or violate the claimants' right to due process of law guaranteed by our Constitution (N.Y. Const., art. I, §§ 6, 7).

Chief Judge DESMOND and Judges BERGAN and KEATING dissent in the following memorandum:

We perceive no warrant for this court, in the first instance, interpreting a statute which has not been passed on in the courts below. Whether the claimants are entitled to partial payment at the present time is a question for the discretion of the Special Term. But if the statute (Administrative Code, § B15-21.0) is considered, we read it as prohibiting the entry of a partial decree.

The pertinent Administrative Code section concededly deals with real property and, although the partial judgment involved herein deals with more than real property alone,

the enabling law pursuant to which this property was taken (General City Law, art. 2-A, § 20) provides that the procedure to be followed shall be "so far as practicable" the same as the procedure governing the acquisition by the city of real property. This is a clear recognition that the procedure shall apply to more than real property alone. Moreover, there is no showing that the procedure is not, in this instance, practicable.

Additionally, we would note that there is simply no basis for inferring that the city has arbitrarily delayed the payment of just compensation. While the taking did indeed occur four years ago, the claimants, as well as the city, have sought review by the higher courts, and the cross appeals to this court were only argued on February 22, 1966 and decided on July 7, 1966 (18 NY2d 212). The claimants receive their full measure of constitutional compensation by the addition of interest for any delay in payment.

We would, therefore, deny the claimants' motion to amend the remittitur on the grounds that (1) the statute prohibits such partial payment and (2), even if the statute be not so construed, a request for partial payment should be addressed to the sound discretion of the Special Term.

Finally, as an absolute minimum, no such sweeping decision involving statutory construction in a case of unusual public interest should be made on a motion to amend the remittitur, without adequate consideration of the important questions presented here. The issues here raised should be set down for oral argument during our next session.

Motion by appellants-respondents to amend remittitur granted in a memorandum.

Appendix C cont'd

All concur except Chief Judge DESMOND and Judges BERGAN and KEATING, who dissent and vote to deny the motion in a memorandum.

Motion by respondent-appellant for reargument denied.

Motion by respondent-appellant to amend remittitur denied.

All concur except Judge KEATING, who dissents and votes to grant the motion because of the decision by the majority of the court to grant the motion of appellants-respondents to amend the remittitur.

APPENDIX D

Opinion of the Appellate Division

(Caption omitted)

Per Curiam. In these consolidated condemnation proceedings appeals have been taken from the third and fourth separate and partial final decrees, by Fifth Avenue Coach Lines, Inc. and Surface Transit, Inc., respectively, and by the City of New York. We affirm in substantial reliance on the comprehensive and forward-looking opinion of Mr. Justice HECHT at Special Term.

Various and complex problems of valuation are indigenous to eminent domain proceedings, and seldom can they be resolved with mathematical precision. The judicial endeavor has been "to find working rules that will do substantial justice", and we have been authoritatively cautioned to be "careful not to reduce the concept of 'just compensation' to a formula" (*United States* v. *Cors,* 337 U. S. 325, 332). The caution is especially apt in the instant case, involving as it does the condemnation of two metropolitan bus transportation systems, because "valuation of utility properties in eminent domain presents unique problems" (*Onondaga County Water Auth.* v. *New York Water Serv. Corp.,* 285 App. Div. 655, 661). Special Term, it seems to us, has explored the problems before it with thoroughness and achieved an essentially fair result. We find no reason to disturb its decrees, and limit ourselves to a brief discussion of its opinion.

What, if any, compensation should be allowed for "going concern value" has proved to be the central issue.

Appendix D cont'd

Special Term convincingly marshalled the evidence showing the meagre earnings of the companies in recent years and, more significant, their still more dismal prospects for the future. It concluded that claimants' bus properties have not been operating profitably and are not capable of profitable operation. The finding has full support in the evidence. As to the poor historical record there can be no room for debate, and with regard to future earnings the court's analysis seems to us irrebuttable. As it pointedly noted (46 Misc 2d 14, 21) "Sixty-eight per cent of Fifth's revenues and 62% of Surface's revenues are derived from routes which are highly competitive with the city's rapid transit system. As long as that system charges only 15 cents, it is unrealistic to expect that passengers on the competitive bus lines will pay a higher fare". And, as Special Term further noted, no findings as to future profits could be premised on claimants' wishful hope that the city would increase the fares on its own transit system. A letter from claimants to the Board of Estimate in February, 1962 confirms Special Term's gloomy prognosis. Claimants, it states, "are in a serious and critical financial condition. Petitioners in 1961 had a loss of $721,410. The loss for January of 1962 is approximately $500,000. Based upon results thus far this year, Petitioners estimate that they will have a loss in 1962, in excess of six million dollars".

The existence of the city's transit system and its fare structure and the city's long-standing fare policies are economic realities of which claimants were always well aware. They have in no sense been misled. Claimants are contending in effect that the terms of the franchises were binding only as long as their operations were profitable;

and if unprofitable, the contracts became a nullity and in their place was substituted some undefined, nebulous, paternalistic obligation on the part of the city somehow to make the operations profitable. But the city never undertook to guarantee the profitability of claimants' operations, either by pumping enormous additional subsidies into their coffers or by permitting them to increase their fares, or by increasing the fares on its own transit system; and, with Special Term, we find no valid basis for determining any issue in this proceeding as if such an undertaking had been given.

There is no contention here that the city had withheld additional subsidies or refused to raise the fares on its own system for the purpose of depressing the value of claimants' properties in contemplated condemnation proceedings. It is undisputed that whether wise or unwise, statesmanlike or unstatesmanlike, the city had made a bona fide governmental and political decision to maintain its fares at a 15-cent rate. We must assume that this decision was animated by the city government's desire to serve its community best; and in that setting, of course, any holding by any court tending to disturb fundamentally such a decision would be an unwarranted usurpation of the legislative function.

The city argues that the finding that the properties have not been operating profitably and are not capable of profitable operation negatives the existence of a going concern value, and it contends that the basis of a proper award should be market value of the physical assets appraised as unconnected units of property. Special Term rejected the contention, stating that the claimants' property "must be

valued as property in use; the city cannot urge that the property should be valued 'as a non-operating transit system' " (p. 26).

We are in accord with the standard thus expressed. These claimants were not yet industrial wrecks; their properties still composed viable, active transportation systems. The companies were operated as co-ordinated transit organizations, with methods, routes, records, garage and shop layouts, personnel and know-how, all reflecting the actual operating experience of several decades. Since their properties were integrated, and so functioning, they should not be appraised as though unintegrated and dismembered. They are worth something more, although to be sure, not entitled to the same increment of value they would enjoy were they operating profitably or with the capacity for future profitable operation.

A possible interpretation of *Banner Milling Co.* v. *State of New York* (240 N. Y. 533), and one strongly urged by the city, is that a going concern value may not exist in the absence of earnings or potentiality for earnings. But the implications of the opinion in that case, as in most cases presenting knotty and elusive issues, cannot be compacted that easily into one rigid and inflexible formula. *Banner* was not concerned with the unique valuation problem presented by a public utility system condemned as an entirety but which was in active though unprofitable use. Where such a system, because it is operationally viable, is seen to have an element of value not reflected in break-up market value, justice requires that this element be recognized—though it may not fit within a conventional nomenclature distilled from different fact situations. And, indeed, if

Special Term has perhaps extended the frontiers of *Banner* and of other decisions dealing with going concern value, to the end of giving appropriate relief in this unique condemnation proceeding, it has done so in pursuance of the fundamental philosophy of such decisions and in our opinion justifiably.

But while we are in agreement with the general concept which Special Term has enunciated, we are divided on certain aspects of the manner of its application. Some of us believe that the trial court may have been overgenerous in evaluating the buildings on the basis of reproduction cost new minus depreciation and in following a hybrid sound value norm as to the revenue vehicles and other personalty items. But while those Justices may entertain reservations as to the amounts of the separate valuations in such categories, they believe that the over-all awards are fair and justified under the general principles applied by Special Term, with which, as we have stated, we are in accord.

As the foregoing indicates, we are not persuaded by claimants' contention that they are entitled, in addition to the all-embracing liberal awards made by Special Term, to separate allowances for what they denominate "going concern assets"—such as the establishment of coach routes, operating schedules, operating systems records and procedures, training of personnel, etc. In avowedly bottoming its award on the premise that claimants' properties must be evaluated as properties "in use," Special Term made ample provision for intangibles of such nature, although without specific itemization. To adopt the language of Mr. Justice Cardozo in *Columbus Gas Co.* v. *Comm.* (292 U. S.

398, 411), they were reflected "in the appraisal of the physical assets as part of an assembled whole." (Cf. *Denver Stock Yard Co.* v. *United States,* 304 U. S. 470, 479; *Matter of Yonkers R. R. Co.* v. *Maltbie,* 251 App. Div. 204, 209; 2 Orgel, Valuation under Eminent Domain [2d ed.], pp. 138-140.) The break-up or "bare bones" value of the physical assets, except perhaps for the real estate, would have been greatly less than the amount fixed by Special Term. Had claimants voluntarily discontinued operations and sought to sell their real estate and personalty, they would have been fortunate to realize the amount which the city on its cross appeals asserts should have been awarded—namely, two thirds of the award. A study of the record convinces us that Special Term compensated claimants very generously for all systems, programs, procedures, records, etc., established and maintained over a period of years, and important to the continuity of the operation of the bus lines.

At the same time, we must add, the utterly fantastic figures sought by claimants for "going concern assets" are so incredibly exaggerated that they amount to no evidence at all, and in effect resulted in a failure of proof. For that reason, and also because at best the increments for such intangibles would be quite moderate, we do not believe, even if Special Term had not made provision for them in its awards, that claimants should be given the opportunity to reopen the proceeding and introduce additional proof in this regard.

After weighing all factors, therefore, and notwithstanding the reservations some of us entertain as to the excessiveness of certain valuations, we reach the over-all

conclusion that the amount fixed for each claimant at Special Term represents an equitable balance—and that the decrees under appeal accomplish the substantial justice to which the parties are entitled.

The decrees should be affirmed, without costs or disbursements to any party.

RABIN, J. (dissenting). I dissent in part and vote to remand this proceeding for further consideration in accordance with the views expressed herein.

That this proceeding encompasses much more than the mere acquisition of physical assets was recognized by the learned Judge below who stated (46 Misc 2d 14, 26): "In the case at bar, the claimants' property is being continued in the public service. Therefore it must be valued as property in use; the city cannot urge that the property should be valued 'as a non-operating transit system.'" Indeed, not only were physical assets seized, but in fact a going business was taken. This condemnation proceeding was instituted for but one purpose—to maintain the services theretofore provided by the claimants. And that purpose was fulfilled. The buses did not stop, not even momentarily. Therefore, "'The claimant is entitled to compensation, not merely for so much land, so much brick, lumber, materials and machinery considered separately, but if they had been combined, adjusted, synchronized and perfected into an efficient functioning unit of property, then it must be paid for that unit, so combined, adjusted, synchronized and perfected, as it existed at the moment of appropriation. In that limited sense, it is entitled to the 'going value'—if such a term is permissible—of its physical property.'"

(*Banner Milling Co.* v. *State of New York*, 240 N. Y. 533, 544.) It is well to state now that "going value" is separate and distinct from "good will" value.

As indicated, Special Term did decide to evaluate the properties condemned as "property in use" and the majority states that "We are in accord with the standard thus expressed." I agree with that determination of Special Term and concur in the comment of the majority with respect thereto. However, Special Term, though enunciating the principle of compensating claimants for "going value" did not, in my opinion, fully hew to such principle. While, in an attempt to reflect "going value", the court appraised the real property, buses and other personal property on the basis of a depreciated reproduction cost rather than a "break-up" market value, to my mind that does not fully reflect "going value". And I see no reason why the valuation should be so limited. The city's only expert witness on the subject of going value—Mr. Edward A. Roberts—authored a book entitled "Fair Value, Going Value, et al. of a Bus Utility." In this work he clearly indicates that giving "reproduction cost new less depreciation" does not constitute compensation for "going value". He calls such compensation an award for merely the "bare bones value of a business property". I accept and agree with that statement of the city's expert.

It should be noted that Mr. Roberts did not refer to "break-up" value as being "bare bones" value. He was referring to value arrived at through the "reproduction costs new less depreciation" method as being "bare bones" value. And that is all that Special Term gave. And that

is exactly what the city's expert said does *not* constitute going value.

In what manner then should claimants have been compensated to reflect such "going value"? I believe that claimants must be compensated *for everything of value taken without which continuity of service could not have been maintained.* Special Term did not award claimants such compensation. And the chief reason for my dissent is because it failed to do so. Some of the items of value taken which were necessary for the continued operation of the buses—call them tangibles or intangibles as you will—for which claimants were not compensated are: coach routes, operating systems, operating records, systems and procedures, trained personnel and layout of bus garages and shops. Nor may the city now be heard to assert that these items were not necessary to maintain continuity of service. The city did in fact condemn these items and, moreover, is making use of them. If it was of the view that these items were not necessary for the operation of the property why were they seized? And inasmuch as they were seized why should not claimants be compensated for them?

I agree with the majority that perhaps the value placed by claimants on these uncompensated properties was much too high, but that is no reason to deny them any compensation at all. However, inasmuch as the city failed to introduce evidence of the value of these properties, I would remand this proceeding to determine a fair amount to be fixed therefor.

However, it is urged that compensation for those additional items of value, so necessary for the uninterrupted and continued operation of the bus line, may not be given

because it is claimed that the operation of the buses has not been a profitable one and that it is not capable of being so operated. Indeed, it has been urged that even "going value" in the limited sense adopted by Special Term may not be given for the same reason. The majority states that Special Term's finding of unprofitable operation "has full support in the evidence". I cannot agree with the majority in that respect. On the contrary, it has been established that these lines can be operated profitably. It would be unfair to judge the financial potential by merely considering one or even a few years of its operation rather than its over-all financial history of profitable operation.

And, even if a finding could be made that the operation was an unprofitable one, without a potential for profit, the city should be precluded from resting on such finding. It should not be heard to urge that full compensation should not be given for value taken because the operation is not a profitable one. It was the city that controlled the earnings of the claimants. Had the city by design depressed the earnings in order to seize the property at less than full "going value" we certainly would not permit it to accomplish such purpose. It makes little difference if we allow the city to get the benefit of such depressed earnings merely because it was not done with that design. For it was the city and the city alone that kept these earnings depressed. So far as the claimants are concerned the result is the same. In the circumstances, and considering the city's control of claimants' income, the claimants should not at the condemnor's instance be penalized for results created by the failure or the refusal of the condemnor to allow a rate that would permit of a reasonable operating profit.

Of course, this is not a rate-fixing proceeding, and I do not propose that we try to arrive at "good will" value—as distinguished from "going concern" value—by first fixing a reasonable rate and then capitalizing the net income that would have been earned had such rate been fixed. Perhaps that should be done. The city certainly had the right—whether acting fairly or not—to refuse to increase the rate of fare to a point where it becomes a reasonable one. However, it should not now be permitted to make capital of that refusal. I might add that there is no controversy at all over the fact that the city recognized the claimants were not receiving sufficient income to fairly compensate for the cost of operation. Indeed, the city tried to assist in that respect. Through no fault of the claimants that assistance proved ineffective, but it does not detract in the slightest from the city's acknowledgment that increased income was justifiable. In the light of the foregoing, I would say it would be improper to deny these claimants what would be justly due them had they operated at a rate which would have enabled them to earn a fair and reasonable profit.

I need not, in view of the fact that this is a minority opinion, consider in depth claimants' contention that they are entitled to an award to cover their pension commitments. It may well be that such commitments are to pay for a "thing of value" of which the city is the beneficiary, having taken over not only the properties but the personnel as well.

Nor shall I discuss the valuation placed on the real or personal property, with the exception that I must observe that there is no support for the deduction of a sum in excess of $1,000,000 for what was termed functional obsolescence

over and above a sum for depreciation. Of course, there is a distinction between the two, and in proper circumstances there could be a deduction for both. But I do not think that the evidence supports the propriety of a functional obsolescence deduction. Here, unlike the situation in the *Maxwell case* (15 A D 2d 153), full use was being made of the real properties by the claimants.

In the decision supporting its tentative decree, Special Term stated that it "did not consider [functional obsolescence] as a separate element of valuation." Not having so considered it, I fail to see how separate deductions should have been made for it. In any event the court did say in its decision that "It is true that there may be some duplication between the two" i.e., depreciation and functional obsolescence. There should be some evidence upon which to base a finding of depreciation as distinguished from functional obsolescence, if indeed there be any, inasmuch as the award makes a separate deduction for each.

Accordingly, I think this proceeding should be remanded for further consideration and, if necessary, for the taking of further testimony in accordance with the views hereinabove expressed.

Botein, P. J., Valente, Stevens and Eager, JJ., concur in *Per Curiam* opinion; Rabin, J., dissents in opinion.

Decrees so far as appealed from affirmed, without costs and without disbursements.

APPENDIX E

Opinion of the Supreme Court New York County

(Caption omitted)

WILLIAM C. HECHT, JR., J. This trial has been brought on by five proceedings in which the City of New York condemned properties of Fifth Avenue Coach Lines, Inc. (hereafter referred to as "Fifth") and Surface Transit, Inc. (hereafter referred to as "Surface") pursuant to resolutions of the Board of Estimate of the City of New York under authority conferred by the New York State Legislature in chapter 161 of the Laws of 1962 (amdg. General City Law, § 20, subd. 2). The validity of the statute was upheld in *Fifth Avenue Coach Lines* v. *City of New York* (11 N Y 2d 342).

THE PROCEEDINGS

Proceeding No. 1, relating to Fifth, was instituted by an order entered on March 21, 1962, pursuant to a resolution of the Board of Estimate on March 20, 1962. In this proceeding, title was taken to Damage Parcels 1, 2, 3 and 4, together with all machinery, fixtures, personal property, including service and inspection vehicles, and equipment located upon these parcels and usable in connection with the operation of omnibuses. The proceeding also took title to 665 specifically identified coaches with their equipment and accessories, excluding tires, tubes, batteries and other equipment subject to existing leases.

Proceeding No. 2, relating to Surface, was instituted by an order on March 21, 1962, pursuant to a resolution

of the Board of Estimate on March 20, 1962. In this proceeding title was taken to all of the real property and fixtures of Surface in Manhattan and The Bronx, consisting of Damage Parcels 5, 6, 7, 8, 9, 10, 11, 12 and 13, together with all machinery, fixtures, personal property and including service and inspection vehicles located in or upon such parcels used and usable in connection with the maintenance, repair, service and operation of omnibuses. In addition, the City took title to 1,029 specified coaches of Surface and 67 service vehicles. The City also took title to accessory equipment, excluding tires, tubes, batteries and other equipment subject to existing leases. By this proceeding the City also specifically condemned all franchises and certificates under which Surface was operating omnibus lines in Manhattan and The Bronx on February 28, 1962.

Proceeding No. 3 relating to both Fifth and Surface, was instituted by an order entered on March 22, 1962, pursuant to a resolution of the Board of Estimate on March 21, 1962. In this proceeding, the City acquired the leasehold interests of Fifth and Surface until December 31, 1963, of the 13th and 14th floors of No. 116-120 W. 32nd Street, Manhattan, and all furniture, office machinery, files, records and documents including personnel and payroll records on these premises (but excluding corporate books and records) necessary to effect immediate operation of the omnibus service previously rendered by Fifth and Surface.

Proceeding No. 4, relating to Fifth, was instituted by an order entered on March 27, 1962, pursuant to a resolution of the Board of Estimate adopted March 26, 1962. In this proceeding the City took title to the leasehold interest of Fifth until December 31, 1963, of a garage at

76-02 Northern Boulevard in Queens, (D. P. 15), and all furniture, office machinery, files, records and documents including personnel and payroll records on these premises (but excluding corporate books and records) necessary to effect immediate operation of the omnibus service previously rendered by Fifth as well as 173 specifically designated coaches and their accessory equipment excluding tires, tubes, batteries and other equipment subject to lease.

Proceeding No. 5, relating to Fifth, was instituted by an order entered May 29, 1962, pursuant to a resolution of the Board of Estimate dated May 24, 1962. In this proceeding the City took title to D. P. 16 and 17, and all furniture, office machinery, files, records and documents including personnel and payroll records on these premises (but excluding corporate books and records) and to six service vehicles and their equipment and accessories excluding tires, tubes, batteries and other equipment subject to existing leases.

As a result of these proceedings the City condemned 844 coaches owned by Fifth and 1,024 buses owned by Surface as well as all their real property and operating garages, shops and offices, and all the service equipment, machinery, fixtures, materials and supplies, books, records, and papers necessary to function as operating companies.

Motion to Consolidate

In view of the manner in which the issues have been tried, claimants' motion to sever Proceeding No. 3, as between Fifth and Surface, and to consolidate so much of that proceeding as relates to Fifth together with Proceedings Nos. 1, 4 and 5, into a single proceeding and so much

of Proceeding No. 3 as relates to Surface with Proceeding No. 2, is granted. The separation of the matters presented in Proceeding No. 3 insofar as personal property is concerned is to be stipulated by Fifth and Surface. The court has now before it in two consolidated proceedings all the matters relating to the value of the property of the two respective claimants.

Respective Valuations of Property Taken

Claimants contend that the fair value of Fifth as of the date of condemnation was $48,000,000 and that the fair value of Surface as of the same time was $44,500,000, a total of $92,500,000. The city urges that the fair value of both companies does not exceed $20,700,000.

The respective valuation figures of the tangible assets are tabulated below and are compared with the book value as of December 31, 1961, as reported by the two companies to the Public Service Commission:

Fifth

	Claimant	*City*	*Commission*
Land	$ 7,508,245	$ 2,705,700	$ 1,382,725
Buildings	15,468,700	3,827,957	2,461,948
Buses	12,259,830	5,183,838	4,141,901
Other personalty	3,409,579	1,754,461	114,398
Total	$38,646,354	$13,471,956	$ 8,100,972

Appendix E cont'd

SURFACE

	Claimant	*City*	*Commission*
Land	$ 5,321,886	$ 1,783,000	$ 723,676
Buildings	10,652,400	3,376,065	4,780,379
Buses	10,394,471	4,518,349	4,252,765
Other personalty	3,737,558	1,917,148	739,477
Total	$30,106,315	$11,594,562	$10,496,297

In addition, claimants assert claims for consequential damages which they sustained by reason of the taking, in the following amounts:

Item	*Fifth*	*Surface*
Pensions	$2,734,107	$ 6,707,617
Workmen's compensation		
a) Administration	78,125	32,875
b) Liabilities in excess of reserve	376,889	148,425
Tort claim administration	2,193,000	2,107,000
Cost of insuring liability to New York City and third persons arising from presence of street railway tracks		3,500,000
Cost of repair of street railroad area		1,680,000
Total	$5,382,121	$14,174,917
Grand total		$19,557,038

The total amount claimed is $112,057,038.

Appendix E cont'd

RESPECTIVE CONTENTIONS OF THE PARTIES

Claimants argue that "the difference between the value of the tangible assets above listed and the respective values of the claimants as a whole represents the value assigned by claimants' expert witness to the fact that claimants were, when taken, going concerns performing a necessary public service *and capable of profitable operations*" (italics supplied). This argument underlies not only the claim of approximately $9.4 millions and $14.4 millions for the alleged "going concern value" of Fifth and Surface respectively, but also claimants' method of valuing the tangible assets.

The city recognizes the principle that "The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken" (*United States* v. *Miller*, 317 U. S. 369, 373). Its argument is: "Inasmuch as claimants had no capacity for profitable operations, exchange value of the property, *as a non-operating transit system* ($20,700,000), places claimants in the pecuniary position they would have occupied had their property not been taken, and represents the highest measure of just compensation" (italics supplied). That argument underlies the city's contention that no allowance should be made for going concern value and also accounts for the city's method of valuing the tangible assets.

After a complete review of the evidence and study of the able and comprehensive briefs submitted by both sides, the court is unable to accept the italicized portions of either of the foregoing arguments. In view of the vigor with which they were presented, the large amounts involved, and the wide disparity in the valuations (caused in large part by

these fundamental differences in the respective legal philosophies), it was deemed desirable to have both sides put in all of their proof. This should avoid the necessity for a retrial if the appellate courts disagree with any of my conclusions.

The trial took over a year. The transcript comes to 20,752 pages. There are 981 exhibits, many of them quite voluminous.

Definition of Terms

It is necessary at the outset to define the term "going-concern value" as it will be used in this opinion, in order to avoid semantic pitfalls. "Going-concern value" "is a portmanteau phrase that needs unpacking" (*Kimball Laundry Co.* v. *United States,* 338 U. S. 1, 9), particularly since it represents the crux of the divergence of valuations here.

"That there is an element of value in an assembled and established plant, [a] doing business and [b] *earning money,* over one not thus advanced, is self-evident." (*Des Moines Gas Co.* v. *Des Moines,* 238 U. S. 153, 165; italics and [a] and [b] supplied.) But items [a] and [b] must be kept separate and distinct.

"Apparently some confusion has arisen in the use of the words 'going concern value' and 'good will.' In its brief the appellant at times uses these words interchangeably. In dealing with the subject of good will the reports and text books use the words 'going concern value,' and the one generally includes the other to some extent. In considering the present point made by the appellant we must be careful to exclude the 'good will' meaning of the words 'going con-

cern value'" (*Banner Milling Co.* v. *State of New York,* 240 N. Y. 533, 543).

"Good Will"

The "good will" meaning of the words "going concern value" in *Banner* (*supra*) referred to the earnings of claimant (240 N. Y. 533, 539).

"There is no more important element in the valuation of commercial properties than earnings" (*Ecker* v. *Western Pacific R. R. Co.,* 318 U. S. 448, 483). "One index of going-concern value offered by petitioner is the record of its past earnings. If they should be found to have been unusually high in proportion to investment in its physical property, that might have been a persuasive indication to an informed purchaser of the business that more than tangible factors were at work" (*Kimball Laundry Co.* v. *United States,* 338 U. S. 1, 16; footnote omitted).

For 1961, Fifth had a deficit of $300,000 after taxes, and Surface had a net income of $90,000 after taxes. For the last three years, the average net income after taxes was $27,000 for Fifth and $552,000 for Surface.

The average net *operating* income for the last ten years for the two companies combined was $3.2 millions. Since this figure is before income taxes and other adjustments (which were not stated in the exhibits), the average net income for the period for both companies would be substantially less.

"It is usually said that market value is what a willing buyer would pay in cash to a willing seller" (*United States* v. *Miller,* 317 U. S. 369, 374, *supra*). Obviously, no willing

buyer would pay $92.5 millions for an enterprise with such an earnings history.

In an effort to escape from this inexorable fact, claimants contend that they are "capable of profitable operation," and their entire valuation structure rests on this foundation. In describing their proof, claimants argue that "the principle is the same as that applied in other areas of the law where the fact of damage is certain but the amount of compensation is in doubt [where] the courts have held that 'reasonable conjectures and probable estimates must be resorted to and the trier of the facts • • • must make the best approximation possible through the exercise of good sense and judgment.'"

This argument is untenable. The cases relied on by claimants involved breach of contract, where the wrongdoer may not require "'any higher degree of certainty in respect to the amount of damages than in respect to any other branch of a cause'" (*Duane Jones Co.* v. *Burke,* 306 N. Y. 172, 192). As was held in the leading case of *Wakeman* v. *Wheeler & Wilson Mfg. Co.* (101 N. Y. 205) and in numerous other cases since then, "where it is certain damages have been caused by a *wrong* and the only uncertainty is as to the amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the *wrong*" (*Alexander's Dept. Stores* v. *Ohrbach's, Inc.,* 269 App. Div. 321, 328; italics supplied).

But here the city has not committed any wrong. It has exercised the sovereign prerogative of eminent domain which was conferred upon it by the Legislature for "the protection of the public health, welfare and safety" (L. 1962, ch. 161, § 1).

Appendix E cont'd

As was said by DYE, J., in upholding the constitutionality of the statute (*Fifth Ave. Coach Lines* v. *City of New York*, 11 N Y 2d 342, 346-347, 349):

"Section 20 of the General City Law (as amd. by L. 1962, ch. 161, eff. March 19, 1962) authorizes a city with a population of one million or more inhabitants to acquire by condemnation any property and the franchises of any person, firm or corporation situated within such city used and usable in the operation of omnibus lines which are entirely within and do not extend beyond the boundaries of such cities, the immediate acquisition of which property and franchises is determined by the Board of Estimate or other appropriate governing body of such city to be necessary to serve the public convenience through the provision of adequate omnibus transportation, notwithstanding the fact that such property and franchises were or are devoted to a public use. In so doing, the Legislature declared that 'the continued uninterrupted adequate, efficient and safe operation of omnibus lines [in such cities] is essential to the health, welfare and safety of the inhabitants of such cities [and that the provisions of the statute as enacted] relate to the protection of the public health, welfare and safety and are for a public purpose' (§ 1).

• • •

"Although it is clear that the question of whether a taking is for a public use is a judicial one (see, e.g., *Denihan Enterprises* v. *O'Dwyer*, 302 N. Y. 451; *Matter of Townsend*, 39 N. Y. 171; *Rindge Co.* v. *Los Angeles County*, 262 U. S. 700), it is equally clear that the taking over by government of the property of a public service corporation

for the purpose of providing the same service under governmental, as opposed to private, auspices *is* a public use (*Long Is. Water Supply Co.* v. *Brooklyn,* 166 U. S. 685, affg. 143 N. Y. 596; *West Riv. Bridge Co.* v. *Dix,* 6 How. [47 U. S.] 507)." (Italics in original.)

In these condemnation cases, the courts may not make awards on the basis of such speculative conjectures or estimates as are made by claimants.

"Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration, for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value—a thing to be condemned in business transactions as well as in judicial ascertainment of truth" (*Olson* v. *United States,* 292 U. S. 246, 257, per BUTLER, J.).

"The actual experience of the Company is more convincing than tabulations of estimates. • • • Elaborate calculations which are at war with realities are of no avail" (*Lindheimer* v. *Illinois Tel. Co.,* 292 U. S. 151, 163-164, per HUGHES, Ch. J.). "The predictions must meet the controlling test of experience" (*ibid.,* p. 170). (See, also, discussion in *Matter of City of N. Y.* [*Lincoln Sq. Proj.*], 22 Misc 2d 619, 625-626, 23 Misc 2d 690, 695; 15 A D 2d 650, mot. for lv. to app. den. 11 N Y 2d 646.)

While the rejection of claimants' contention could rest on their complete failure to sustain their burden of proof, it may be added that the evidence convincingly demonstrates that claimants are not capable of profitable operation.

Appendix E cont'd

Claimants argue first that by rearrangement of routes and elimination of personnel, they could achieve substantial operating economies. If this could have been done without involving labor troubles which precluded service, one wonders why it was not done many years ago.

Claimants' basic contention is that they have a heavy density of passenger traffic, but have not been able to operate profitably because their fare has consistently been restricted to an inadequate figure; and that the present 15-cent fare is inadequate, especially when compared with the 20-cent and 25-cent fares prevailing in most other large cities. Their argument is that they have a constitutional and statutory right to a compensatory fare, and that if such compensatory fare were in effect, they could operate profitably.

The complete answer is that, during the entire 10-year period while claimants' earnings before income taxes averaged only about $3.2 millions on a business alleged to be worth $92.5 millions, they had whatever right they now contend for, yet they failed to assert it. This must have been because they recognized that they could not overcome the practical or legal obstacles, or both. They have not shown any greater chance of success at this time.

The practical obstacle was and continues to be insuperable. Sixty-eight per cent of Fifth's revenues and 62% of Surface's revenues are derived from routes which are highly competitive with the city's rapid transit system. As long as that system charges only 15 cents, it is unrealistic to expect that passengers on the competitive bus lines will pay a higher fare.

Claimants introduced testimony to the effect that the city would have to increase the fare on its own rapid transit system. This testimony was nothing more than the wishful thinking of claimants' witness. A condemnation award cannot be predicated on such a surmise.

The legal obstacle to a higher fare seems equally insuperable. In view of their franchise agreement to charge no more than 15 cents, claimants have no *constitutional* right to a higher fare. (*Public Service Comm.* v. *Westchester St. R. R. Co.*, 206 N. Y. 209, 220-221; *Texarkana* v. *Arkansas Gas Co.*, 306 U. S. 188, 204.)

As to their claimed statutory right, claimants point out that, prior to the transfer of authority over bus fares from the Public Service Commission to the City of New York by section 5-d of the Public Service Law, article 3-A of that statute gave the commission power to increase rates even though they were fixed by franchise contracts (*People ex rel. City of New York* v. *Nixon*, 229 N. Y. 356). They contend that since they accepted their franchises while that power was vested in the commission, the transfer of regulatory power merely changed the tribunal; it did not relieve the city, as the new regulatory authority, from the obligation to permit a compensatory fare without regard to the franchise restrictions. The city contends that the present statute authorizes it to enforce the franchise agreement as to fares.

It is unnecessary to examine the many cases on this problem, since "The rule governing the authority of the Public Service Commission to abrogate franchise contracts between municipalities and public utilities, as ap-

pears from the opinions and judgments in several still approved cases, might seem to lack the clarity of the rule in *Shelley's* case" (HILL, P. J., in *Matter of Queens-Nassau Tr. Lines* v. *Maltbie*, 271 App. Div. 81, 84-85, affd. 296 N. Y. 893, 901). We will assume *arguendo* that claimants' interpretation is correct.

At most, that would mean that claimants would be entitled to a compensatory fare as long as they were required to operate (*People ex rel. City of New York* v. *Nixon, supra*, pp. 358-359). The rationale of *Nixon* was that, by enactment of the Public Service Commission Law (now the Public Service Law), the Legislature had initiated a new public policy; "rates were thereafter to be just and reasonable alike for carriers on the one side and for passengers or shippers on the other."

But the Legislature never declared, and *Nixon* (*supra*) does not hold, that the city is required to allow claimants to continue operations when the latter are unwilling to adhere to the fare fixed in the franchise. On the contrary, the Legislature specifically authorized the city "to acquire by condemnation any property and the franchises" of any omnibus corporation, "the immediate acquisition of which property and franchises is determined by the board of estimate * * * to be necessary to serve the public convenience through the provision of adequate omnibus transportation" (L. 1962, ch. 161, *supra*).

This grant of power must be read in the context of well-established condemnation law, that the amount to be paid to the condemnee is the value of its property on the date of condemnation. To the extent that the condemnee's earn-

ings are material to that determination, it is the earnings on that date.

The Legislature was certainly familiar with this well-established principle when it enacted chapter 161 of the Laws of 1962. It would be anomalous to torture out of that statute a mandate that the condemnee's property should be valued on the hypothetical prospect as to what its earnings might be if it were forced to continue operations, and by virtue of such compulsion the city would be required to allow the claimants a higher fare.

This is particularly true because the Legislature enacted the instant condemnation statute on the basis of its findings and declaration that "the continued uninterrupted adequate, efficient and safe operation" of claimants' omnibus lines "is essential to the health, welfare and safety of the inhabitants" of the city. "Adequate" operation embodies the concept of a fare within the means of those using the facilities. And the Legislature has shown itself conscious of and sympathetic to the city's effort to preserve the present fare structure (see L. 1964, ch. 513). It would be flying in the face of the clearly indicated legislative purpose in the enactment of the two foregoing statutes, to hold that claimants may require the city either to allow them to continue operations at a higher fare, or to pay for their properties a price computed on the basis of such hypothetical higher fare—when the very payment of such price might necessitate an increase in fare, which was one of the things the condemnation was designed to avoid.

The city has condemned claimants' bus lines for a public purpose authorized and approved by the Legislature. It would be unconscionable to compel the city, under such

circumstances, to pay $92.5 millions for properties having a book value of $18.6 millions, when the enterprise has not earned an adequate return even on this book value and has not shown itself capable of profitable operation in the past or in the future.

There is another compelling reason why claimants' contention must be rejected. Even if we accept their argument that section 5-d of the Public Service Law imposes on the city the same obligation as section 63-b imposed on the Public Service Commission, that does not establish the value sought by claimants.

In fixing rates under section 63-b, the commission "may consider all facts which in its judgment have any bearing upon a proper determination of the question * * * with due regard among other things to a reasonable average return *upon capital actually expended*" (italics supplied). This vital distinction between the foregoing basis of rates for omnibus companies (which applies also to gas and electric, steam, and waterworks corporations) and railroad and telephone rates, which are based "upon the value of the property actually used in the public service", was pointed out by Judge FROESSEL in *Matter of New York Tel. Co.* v. *Public Serv. Comm.* (309 N. Y. 569, 577; see application of this principle to electric rates in *Matter of City of N. Y.* v. *Public Serv. Comm.*, 17 A D 2d 581, 584, mot. for lv. to app. den. 13 N Y 2d 594).

Therefore, if claimants' interpretation of section 5-d is correct, the city would be fully discharging its duty if it fixed a fare which would show an adequate return on the $8.1 millions of capital actually expended by Fifth, and the $10.8 millions of capital actually expended by Surface.

Such a fare would not justify the valuation sought by claimants.

It is true that book value is not the limit of value in condemnation cases (*Onondaga Co. Water Auth.* v. *New York Water Serv. Corp.*, 285 App. Div. 655, 662). If claimants' land has appreciated, they will get the benefit of that increase. If the market value of the buildings and buses to a willing buyer wishing to continue the bus operation exceeds their book value, claimants will get that excess. Claimants will receive the fair value which a willing buyer would pay for the land, garages, buses and equipment being used by a going bus operation with a meager earnings record. The evidence establishes that the foregoing possible increases in value do not justify the valuation sought by claimants in the absence of a tremendous allowance for good will, which they have not proved.

In *Matter of City of New York (Sixth Ave. El. R. R.)* (265 App. Div. 200), relied on by claimants, the Sixth Avenue Elevated, which had been condemned, had been operated as an integral part of the Manhattan Railway System. There was no proof at all as to what its income would have been if severed from the remainder of the system. The court remanded for the purpose of taking such proof, holding that "The first essential question to be determined in fixing the value of property taken under such circumstances is to ascertain whether the railroad was capable of profitable operation. * * * If the court should determine that the Sixth Avenue Line was capable of profitable operation, then some fair measure of the value of the railroad as a going concern would have to be applied" (pp. 205-206).

Appendix E cont'd

In the instant case, volumes of testimony have been taken on this subject, and the court has concluded that claimants have not established that they are capable of profitable operation. Where this finding is made, no allowance is given for good will (*Matter of City of New York [Manhattan Ry. Co.]*, 265 N. Y. 170, 182). As was said by CARDOZO, J., in affirming that decision: "Substantial prices are not paid for the privilege of conducting a business at a loss" (*Roberts* v. *New York City*, 295 U. S. 264, 282).

Claimants offered testimony as to the "ratio of going concern value to gross revenues as shown by sales of other metropolitan transit systems to public agencies", inasmuch as "public agencies have become the dominant class of purchasers of urban transit lines". Their witness argued that these sales were relevant because their "average asset mix" was similar to that of claimants.

Net earnings, rather than gross revenues, constitute the measure of value. Moreover, "the law is well settled that market value can only be established by sales of other property in the vicinity which is *similar* to the property taken" (*St. Agnes Cemetery* v. *State of New York*, 3 N Y 2d 37, 44 [italics in original]; see, also, *Matter of City of N. Y. [2460 Jerome Ave. Realty Corp.]*, 18 A D 2d 991; *United States* v. *Toronto Nav. Co.*, 338 U. S. 396, 406-407). I can see no similarity between claimants' bus operations in Manhattan and the Bronx and bus operations in other cities "having an average asset mix,"—especially since almost every other major municipal system operated at basic fares ranging from 20 cents to 30 cents, compared to the 15 cents' fare charged by claimants, and since claimants' witness disclaimed any effort "to undertake a detailed analysis of the

assets involved in each of these transfers," or of the equipment and operations of any of the bus companies sold.

"Going Concern Value"

"The claimant is entitled to compensation, not merely for so much land, so much brick, lumber, materials and machinery considered separately, but if they have been combined, adjusted, synchronized and perfected into an efficient functioning unit of property, then it must be paid for that unit, so combined, adjusted, synchronized and perfected, as it existed at the moment of appropriation. In that limited sense, it is entitled to the 'going value'—if such a term is permissible—of its physical property" (*Banner Milling Co.* v. *State of New York,* 240 N. Y. 533, 544). "It is now generally recognized that 'going value', as distinct from 'good will', is to be considered in valuing the property of a public service corporation either for the purpose of condemnation or rate making • • •" (*People ex rel. Kings County L. Co.* v. *Willcox,* 210 N. Y. 479, 484.)

"In this situation, there can be no question of the company's right to adequate compensation for the use of its property employed, and necessarily employed, in the public service; nor can it be doubted that the property must be valued as property in use. It involves a practical contradiction in terms to say that property useful and actually used in a public service is not to be estimated as having the value of property in use, but is to be reckoned with on the basis of its 'junk value'" (*Denver* v. *Denver Union Water Co.,* 246 U. S. 178, 190-191). The condemnation here "did not limit the value to the bare bones of the plant • • •.

The difference between a dead plant and a live one is a real value" (*Omaha* v. *Omaha Water Co.*, 218 U. S. 180, 202).

In the case at bar, the claimants' property is being continued in the public service. Therefore it must be valued as property in use; the city cannot urge that the property should be valued "as a non-operating transit system." However, this does not justify the separate and additional valuation sought by claimants for the following items:

	Fifth	*Surface*
Coach routes	$ 3,120,000	$ 3,760,000
Operating schedules	359,000	640,000
Operating systems, records and procedures	1,116,700	1,665,300
Trained personnel	5,807,900	5,581,400
Layout of bus garages and shops	125,000	150,000
Operating rights and permits	.....	1,500,000
Perpetual franchises	750,000	.....
	$11,278,600	$13,296,700

This is claimants' alternative method of arriving at the overall claim of $48,000,000 for Fifth and $44,500,000 for Surface, in the event that the court does not accept claimants' argument (*supra*), that their capacity for profitable operation justifies this increase for "good will" in the valuation of their tangible assets ($38,646,000 for Fifth and $30,106,000 for Surface).

No allowance may be made for Surface's operating rights and permits nor for Fifth's perpetual franchises for the

reasons already stated in the discussion of the *Nixon* case. The other items are not supported by the cases urged by claimants.

Banner Milling Co. v. *State of New York* (240 N. Y. 533, *supra*), the case which recognized the principle that allowance must be made for "going value" in a condemnation proceeding, specifically held that a separate valuation was *not* required to compensate for the expenses involved "in building up and constructing the mill as a going concern, efficient and appropriate for the business," so long as claimant was allowed the full value of the tangible assets, viewed as a going concern. The court said (pp. 544-545):

"The point which the appellant now makes is that the findings show that the court in arriving at its conclusions failed to follow this rule. I do not think so.

"At the request of the claimant the court found as follows:

"'32. That the fair value of architect's and engineer's fees upon the construction and equipment of said plant, insurance premiums and interest on investment during construction period, railway franchises, legal expenses, sundry items correcting errors in construction, expenses incurred in operating mill at a loss up to time when machinery is synchronized and coordinated so as to produce satisfactory results is the sum of Seventy-five Thousand Dollars ($75,000.00).' It refused to find that the claimant was entitled to this figure. Its action is important so I shall quote the finding which was refused.

"'5. That claimant is entitled to recover from the State of New York the sum of Seventy-five Thousand Dollars the

fair and reasonable sound value of the architect's and engineering fees, taxes, interest and insurance covering the period of construction, legal fees, franchises and losses incurred during period of "tuning up," synchronizing and co-ordinating plant so as to reach normal efficiency, taken and destroyed by the State in the taking of physical property on the 7th of April, 1917.

" 'Refused.'

"Nowhere does it appear, however, that all these elements making up this $75,000 expense were not considered by the court in arriving at its total figure of valuation. What elements it considered or excluded is not stated. *As I have said, the claimant was not entitled as a matter of law to recover these expenses; it was entitled to have them considered as necessary in building up and constructing the mill as a going concern, efficient and appropriate for the business.*" (Italics supplied.)

See, also, *Des Moines Gas Co.* v. *Des Moines* (238 U. S. 153, 171, *supra*).

Kimball Laundry Co. v. *United States* (338 U. S. 1, *supra*), the authority most strongly urged by claimants, must be read with caution. Mr. Justice FRANKFURTER, who wrote the opinion of the court for four Justices, emphasized that the case involved a temporary, and not a permanent taking. "The temporary interruption as opposed to the final severance of occupancy so greatly narrows the range of alternatives open to the condemnee that it substantially increases the condemnor's obligation to him. It is a difference in degree wide enough to require a difference in result" (p. 15). Four Justices dissented, and Mr. Justice

RUTLEDGE concurred in the result solely on the ground "that short-term takings of property entail considerations not present where complete title has been taken" (pp. 21-22).

However, even on the assumption that the *Kimball* principles would apply to a fee taking, it does not help claimants here. There the holding was that "there should have been included in the award to [claimant] some allowance for diminution in the value of its business due to the destruction of its 'trade routes.' The term 'trade routes' serves as a general designation both for the lists of customers built up by solicitation over the years and for the continued hold of the Laundry upon their patronage" (p. 8). The rationale of the court was thus expressed (pp. 9-10):

"Since petitioner has been fully compensated for the value of its physical property, any separate value that its trade routes may have must therefore result *from the contribution to the earning capacity of the business of greater skill in management and more effective solicitation of patronage than are commonly given to such a combination of land, plant, and equipment.* The product of such contributions is an intangible which may be compendiously designated as 'going-concern value,' but this is a portmanteau phrase that needs unpacking.

"Though compounded of many factors in addition to relations with customers, that element of going-concern value which is contributed by superior management may be transferable to the extent that it has a momentum likely to be felt even after a new owner and new management have succeeded to the business property. But because this momentum can be maintained only by the application of continued energy and skill, it would gradually spend itself if the effort

and skill of the new management were not in its turn expended. See Paton, Advanced Accounting 427, 435 (1941). *Only that exercise of managerial efficiency, however, which has contributed to the future profitability of the business will have a transferable momentum that may give it value to a potential purchaser; that which has had only the effect of increasing current income or reducing expenses of operation has spent itself from year to year.*" (Italics supplied.)

Claimants here have not shown any "contribution to the earning capacity of the business of greater skill in management and more effective solicitation of patronage than are commonly given to such a combination of land, plant, and equipment." On the contrary, their testimony of expenditures for training personnel, for mapping out coach routes, for developing operating systems and schedules, and for laying out garages, at most, would have "only the effect of increasing current income or reducing expenses of operation".

There is a vast difference between money spent in developing patronage in a competitive business, and the expenditures which claimants seek to make a basis for valuation here. An established following in a competitive business is an asset of value for which a buyer will pay, but "That kind of good will * * * is of little or no commercial value when the business is, as here, a natural monopoly, with which the customer must deal, whether he will or no" (*Omaha* v. *Omaha Water Co.*, 218 U. S. 180, 202, *supra*).

Nor would buyers ordinarily pay anything for the seller's expenditures in developing a trained labor force or for the other costs claimed here, especially where the end result of those expenditures fails to produce a profit. To repeat Jus-

tice CARDOZO's language: "Substantial prices are not paid for the privilege of conducting a business at a loss" (*Roberts* v. *New York City*, 295 U. S. 264, 282, *supra*).

Claimants cite my decision [in this case] denying the city's motion to quash their subpoena duces tecum, wherein I said:

"Claimants seek evidence to show that the city has continued the use of their trained and experienced personnel and of their tested operating routes and schedules. If this be established, and if it be shown that it would have cost the city substantial sums to hire and train its own personnel, and to work out its operating routes and schedules, and that the city obtained the benefit of claimants' investment in thus building up a going business which the city was able to take over and operate without interruption, that *might* be an element of going concern value." (N. Y. L. J., Feb. 18, 1963, p. 15, col. 3; italics supplied.)

That ruling was made in accordance with the policy described above of admitting all testimony which might be deemed relevant, in order to make a complete record. Study of the cases satisfies me that the expenses referred to are not an element of going concern value in this case.

In *People ex rel. Kings County L. Co.* v. *Willcox* (210 N. Y. 479, *supra*), another case relied on by claimants, the court said: "[The utility] would have been entitled to a return on the valuation adopted by the commission, if it had no customers, but was just ready to begin business, whereas it had a plant in operation with an established business which every one knows takes time, labor and money to build up" (p. 485).

That was a rate case, not a condemnation case. Although at the outset of his opinion, Judge MILLER indicated that

"'going value' • • • is to be considered in valuing the property of a public service corporation either for the purpose of condemnation or rate making" (p. 484), this is qualified in the subsequent portions. Thus, he says (pp. 488-489): "It may be, as is urged, that a well-conducted enterprise will charge the cost of developing the business to operating expenses, and that it would open the door to an overissue of securities to permit the capitalization of early losses. In answer, it is sufficient to say that we are dealing, not with proper methods of bookkeeping, not with the proper capitalization upon which to issue securities, but solely with the fair return which the company is entitled to receive from the public. Treating a reasonably necessary and proper outlay in building up a business as an investment for the purpose of determining the fair rate of return to be charged *is far from holding that it should be treated as capital against which securities might be issued*" (italics supplied).

If such an outlay may not "be treated as capital against which securities might be issued", there is substantial doubt as to whether it may be treated as a component of value in condemnation. Even in that context, while the court made reference to correction of mistakes in construction, making experiments which sometimes turn out to be useless, and perfecting an organization (p. 486), it concluded by saying (p. 487): "By the expenditure of time, labor and money, it coordinates those bones into an efficient working organism and *acquires a paying business*" (italics supplied).

That case thus repeats the concept expressed in the *Des Moines Gas* case (238 U. S. 153, *supra*) and the other Fed-

eral cases, that the expenditures to which it is sought to assign a value must have resulted in earning money.

In *Omaha* v. *Omaha Water Co.* (*supra*), a condemnation case cited with approval in *Willcox* (*supra*), the court said, per LURTON, J. (218 U. S. 180, 202-203): "The option to purchase excluded any value on account of unexpired franchise; but it did not limit the value to the bare bones of the plant, its physical properties, such as its lands, its machinery, its water pipes or settling reservoirs, nor to what it would take to reproduce each of its physical features. The value in equity and justice must include whatever is contributed by the fact of the connection of the items making a complete and operating plant. The difference between a dead plant and a live one is a real value, and is independent of any franchise to go on, or any mere good will as between such a plant and its customers. * * * That there is a difference between even the cost of duplication, less depreciation, of the elements making up the water company plant, and the commercial value of the business as a going concern, is evident. Such an allowance was upheld in *National Waterworks* v. *Kansas City*, 62 Fed. Rep. 853, where the opinion was by Mr. Justice BREWER. We can add nothing to the reasoning of the learned Justice, and shall not try to."

In *National Waterworks Co.* v. *Kansas City* (62 F. 853) Mr. Justice BREWER, speaking as the Circuit Justice for the Eighth Circuit, said (p. 865): "Nor would the mere cost of reproducing the waterworks plant be a fair test, because that does not take into account the value which flows from the established connections between the pipes and the buildings of the city. It is obvious that the mere cost of purchasing the land, constructing the buildings, putting in the ma-

chinery, and laying the pipes in the streets—in other words, the cost of reproduction—does not give the value of the property as it is today. A completed system of water works, such as the company has, without a single connection between the pipes in the streets and the buildings of the city, would be a property of much less value than that system connected, as it is, with so many buildings, and earning, in consequence thereof, the money which it does earn. The fact that it is a system in operation, not only with a capacity to supply the city, but actually supplying many buildings in the city,—*not only with a capacity to earn, but actually earning,*—makes it true that 'the fair and equitable value' is something in excess of the cost of reproduction. The fact that the company does not own the connection between the pipes in the streets and the buildings—such connections being the property of the individual property owners—does not militate against the proposition last stated, for who would care to buy, or at least give a large price for, a waterworks system without a single connection between the pipes in the streets and the buildings adjacent. Such a system would be a dead structure, rather than a living and going business. The additional value created by the fact of many connections with buildings, *with actual supply and actual earnings,* is not represented by the mere cost of making such connections. Such connections are not compulsory, but depend upon the will of the property owners, and are secured only by efforts on the part of the owners of the waterworks, and inducements held out therefore. The city, by this purchase, steps into possession of a waterworks plant, —not merely a completed system for bringing water to the city, and distributing it through pipes placed in the streets,

but a system already earning a large income by virtue of having secured connections between the pipes in the streets and a multitude of private buildings. *It steps into possession of a property which not only has the ability to earn, but is in fact earning. It should pay therefor not merely the value of a system which might be made to earn, but that of a system which does earn*" (italics supplied).

In addition to the foregoing emphasis on earning capacity and actual earnings—neither of which was established in the case at bar—there is another reason why the language of the cited cases does not help claimants here.

There is a vital distinction between the physical plant of a water, gas, electric or telephone company and the physical plant of a bus company. In the former cases, the service is produced by a fixed plant which requires physical connections with each of the customers served. Therefore, pipes or wires effectuating those connections are worth more when they are actually attached than they would be on the floor of a warehouse, and full value is not represented by their reproduction cost less depreciation.

In the case of a bus company, on the other hand, the service is produced by mobile vehicles which pick up their customers on the street. Therefore the full value of these vehicles would be represented by their reproduction cost less depreciation. The award here must be determined by the actualities, not by semantic similarities which do not fit the facts.

The city's contention is equally untenable. As already indicated, claimants are entitled to have their property valued as "property in use," not as junk value (*Denver* v. *Denver Union Water Co.*, 246 U. S. 178, *supra*). This means

that full going value must be assigned to their tangible physical assets. These assets may not be devalued on the city's premise that "absent condemnation in March of 1962, claimants would have entered bankruptcy to avoid incurring further deficits."

Just as claimants may not increase their value on the basis of a profitable operation which they never enjoyed, the city may not decrease the value on the basis of a bankruptcy which has not occurred. Neither may the city ask for a valuation predicated on reducing the fare to 10 cents or 5 cents, nor on its withdrawal of the substantial assistance given to claimants by way of payment of school fares in reduction of franchise taxes.

We may assume that the city could take these actions at any time if that was done in the bona fide exercise of its governmental responsibilities. But it may not do so for the purpose of depressing the value of claimants' properties in the projected or pending condemnation proceeding. (*Matter of City of New York* [*Inwood Hill Park*], 230 App. Div. 41, 43-44, 46-47, affd. 256 N. Y. 556; *United States* v. *Meadow Brook Club*, 239 F. 2d 41, 45 [2d Cir.], cert. den. 358 U. S. 921.)

Claimants' physical assets must be taken at the value which "a willing buyer would pay in cash to a willing seller." If private buyers are not available because of the regulatory restrictions, it is what the city would probably pay if it were negotiating at arm's length without the sanction of condemnation. "Since a transfer brought about by eminent domain is not a voluntary exchange, this amount can be determined only by a guess, as well informed as possible, as to what the equivalent would probably have been had a

voluntary exchange taken place" (*Kimball Laundry Co.* v. *United States,* 338 U. S. 1, 6, *supra*).

In accordance with these principles, I have valued claimants' garages at their reproduction cost new, less physical depreciation and an allowance for functional depreciation. This is not on the theory that they are specialties, because obviously they are not. (*Matter of City of New York* [*Maxwell*], 15 A D 2d 153, 171-172, *supra; Matter of City of New York* [*Madison Houses*], 17 A D 2d 317, 319-320.)

However, they are specially designed as bus garages, for which purpose they are worth more than their economic value as truck or ordinary garages. Since the city is continuing their use for the same more valuable purpose, it is only fair that they should pay what it would cost the city to erect comparable facilities, i.e., their reproduction cost new less physical depreciation. In such a situation, the value to condemnee and the value to condemnor is identical.

As was said in *Kimball Laundry Co.* v. *United States* (338 U. S. 1, 6, *supra*): "But when the property is of a kind seldom exchanged, it has no 'market price', and then recourse must be had to other means of ascertaining value, including even value to the owner as indicative of value *to other potential owners enjoying the same rights*" (italics supplied). Where improvements "are custom built or expressly adopted to fit the premises, the rule of reproduction cost less depreciation is seemingly suited to the purpose by a somewhat similar principle to that which has been applied in the assessment of real property in specialty cases" (*Marraro* v. *State of New York,* 12 N Y 2d 285, 296).

Claimants object to any allowance for functional obsolescence, contending that this is embraced in the allowance

for physical depreciation. It is true that there may be some duplication between the two, because as a building ages it loses some of its functional utility. However, the two items are separate and distinct. Physical depreciation refers to physical wear and tear; functional obsolescence refers to improvement in the arts which may make a building less suitable for its intended purpose despite its excellent physical condition. See *Matter of City of New York (Maxwell)* (15 A D 2d 153, 175).

REAL ESTATE

Claimants' real estate expert was John J. McCormick. His appraisals consist of two principal components. The first component is a market appraisal of the land value of each Damage Parcel. The second component is an appraisal of the value of the structures which constitute the improvements to the land. This second component is a sound value appraisal in the form of reproduction cost new, less depreciation, for all the structures except those located on D. P. 7 and D. P. 11. This sound value appraisal was made by other experts and adopted by Mr. McCormick, who testified that these structures were specialties which could not be adequately appraised by reference to the economic data of the rental market. He did make economic appraisals of the D. P. 7 and D. P. 11 structures, however, and he also made alternative economic appraisals of the buildings located on D. P. 1 and D. P. 16.

After the close of the City's case, Mr. McCormick testified in rebuttal. At this time he presented an analysis of the economic value of the structures which had been valued

previously only as specialties. Counsel for claimants stated that this proof was submitted in order to avoid a failure of proof on the economic value of the structures should the court decide that they were not specialties. Mr. McCormick testified that he still considered the highest and best use of the buildings to be as bus garages and he still believed the buildings to be specialties properly valued on a sound value basis. He stated, however, that he was able to analyze the value of the buildings on an economic basis by assuming that they were no longer to be used by bus companies but were to be occupied for some secondary use, such as garages for heavy trucking, which could be carried on in the buildings but which would not require or utilize the buildings' special features.

The City's real estate appraiser was John J. Hynes. His appraisals also consist of two principal components—land value and building value. He made a market appraisal of land value, but unlike Mr. McCormick, he made an economic appraisal of the structures and testified that, in his opinion, none of the buildings is a specialty. In addition, the City adduced proof of the reproduction cost new, less depreciation, of the structures which the claimants contend are entitled to specialty status.

Land

Both Mr. McCormick and Mr. Hynes fixed the land value units by considering relevant sales of "comparable" properties. They both analyzed all of the sales submitted by the respective parties but in only a few instances did they agree on a particular sale as relevant or comparable.

Mr. McCormick's method of arriving at land value was diametrically opposed to the method adopted by Mr. Hynes. Mr. McCormick restricted his consideration to sales of sites large enough to be devoted to transit operations and with improvements capable of being converted thereto, regardless of their location. A statement of his method appears at page 1677, S. M., where on cross-examination, he stated the following reasons for rejecting the sales submitted by Mr. Hynes:

> "A. Well, what I did was to look for or analyze your sales on the basis of what might have some comparability to the land that I was appraising on the various damage parcels. I considered all of these City sales with a regard to whether the property having been sold could have been developed with an operation such as one of these bus buildings represented.
>
> "To do that, I considered two things. I considered the existing zoning which first would be necessary to permit the building of a building. I also considered the area of the land that was sold to determine whether the land and area was practical to be improved with the building which would house a bus operation. Where I found land that would not permit erection of any kind of a building for bus operation because of the zoning, I disregarded that for the obvious reason that you could not build a bus building. Where I found land that by the nature of its area involved in the sale was not large enough for improvement with a building which would be suitable for bus operation, I disregarded that sale. I found—there is another general

classification. I found a number of sales which I had described on your list under 'Miscellaneous Buildings and/or Garages', which represented land upon which were erected buildings of various types which, in my opinion, the buildings could not be converted economically, in my opinion, for bus operation.

"And that would also—well, I think that would cover the miscellaneous buildings and the garage type of buildings. And I disregarded those sales".

The result of this approach compelled Mr. McCormick to value the land under review on an overall square foot basis and restricted him to the use of sales in locations which were in most instances; distant from claimants' operating garages and in areas where realty values showed a constant yearly increase. For example, he added five per cent for each year that had passed since the particular sale he relied on had been made, on the ground that rents had increased by that amount in Manhattan and the Bronx. The fact is that most of the Damage Parcels were located in peripheral and poor sections of the City which have not felt the favorable impact of a rising real estate market.

Mr. Hynes valued the land under review for existing and potential usage. He considered 146 sales in the vicinity of the Damage Parcels, computed a unit lot value (25′ x 100′) then applied the unit to the Damage Parcels, added increments for key, corner, frontage and plottage and also distinguished between the high-valued main streets and the lower-valued side streets upon which a Damage Parcel faced.

This is the traditional method approved by this court and applied to large as well as to small plots (Matter of the City of New York [Lincoln Square Projects], 22 Misc 2d 619, 23 Misc 2d 690, affd. 15 A D 2d 650; D. P. 110—large industrial building; D. P. 462—ice plant; D. P. 477—large [239′ x 100′] auto repair shop).

I have adopted Mr. Hynes' method, but have not agreed in all instances with his analysis of the sales he relied on to establish his unit value or the extent to which he applied the values to the several Damage Parcels. For example, in his analysis of claimants' sales Nos. 5, 8 and 20, he assigned a non-justified portion of the sales price to the improvements and his valuing of segment (E) of the land area in Damage Parcel 2 was improper.

The following is my finding of the land value of the Damage Parcels.

FIFTH

DAMAGE PARCEL 1:

This was the smallest garage used by the claimants for bus storage and maintenance. It is located on East 12th Street running through to East 11th Street between First Avenue and Avenue A with a frontage of 175 feet on both streets and a depth of 206.50 feet. The plot area is 36,138 square feet. The court used a value of $5.25 per square foot which included an increment for a non-conforming use and added increments of 10% for additional frontages and 10% for plottage, all of which resulted in a land value of $226,117.

Appendix E cont'd

DAMAGE PARCEL 2:

This is the most important parcel taken. It is a large parcel containing 84,136 square feet located on Ninth Avenue and 54th Street in the heart of midtown Manhattan. The court used a value of $17 per square foot on Ninth Avenue, $14.65 on West 54th Street and $13.40 per square foot on West 53d Street, which included an increment for a non-conforming use and added increments of 50% for corner, 10% for key, 10% for conjunctive use, 10% for additional frontages and 15% for plottage, all of which resulted in a land value of $2,022,172.

DAMAGE PARCEL 3:

This damage parcel consists of a complete city block fronting 201.83 feet on Lexington and Park Avenues and 405 feet on 99th and 100th Streets. It contains 81,742 square feet. The court used a value of $4.85 per square foot on Lexington Avenue, $3.40 per square foot on Park Avenue and $3.15 per square foot on 99th and 100th Streets, which included an increment for a non-conforming use and added increments of 50% for corners, 10% for keys, 10% for conjunctive use, 15% for additional frontages and 20% for plottage, all of which resulted in a land value of $472,652.

DAMAGE PARCEL 4:

This is a parcel with a block frontage of 199.83 feet on Lenox Avenue and frontage of 649 feet on both West 146th and 147th Streets. It has an area of 129,692 square feet. The court used a value of $4.85 per square foot on Lenox

Avenue and $3.10 per square foot on West 146th and 147th Streets and added increments of 50% for corners, 10% for keys, 10% for conjunctive use, 10% for additional frontages, and 20% for plottage, all of which resulted in a land value of $640,947.

DAMAGE PARCEL 16:

This is a small parcel on 130th and 131st Streets between Broadway and 12th Avenue. It has an area of 14,988 square feet and 75 feet frontage on both streets and running 199.83 feet in depth. The court used a value of $3.60 per square foot and added increments of 10% for additional frontages and 10% for plottage, which resulted in a land value of $65,282.

DAMAGE PARCEL 17:

This property is located at 132d Street just off Broadway. The area of the plot is 82,431 square feet. The court used a value of $3.60 per square foot and added increments of 10% for additional frontages and 15% for plottage, which resulted in a land value of $375,290.

SURFACE

DAMAGE PARCEL 5:

This property covers a square block, 200 feet x 541 feet, between Second and First Avenues, 126th and 127th Streets, with a plottage of 105,712 square feet. The court used a value of $4.20 per square foot on Second Avenue and $2.80 per square foot on First Avenue and on 126th and 127th Streets, and added increments of 50% for

corners, 10% for keys, 10% for conjunctive use, 15% for additional frontages, and 20% for plottage, all of which resulted in a land value of $512,870.

DAMAGE PARCEL 6:

This property is located on the east side of Amsterdam Avenue between 128th and 129th Streets, running east about 366 feet, containing 73,226 square feet. The court used a value of $6 per square foot on Amsterdam Avenue and $4 on 128th and 129th Street, and added increments of 50% for corners, 10% for keys, 10% for conjunctive use, 15% for additional frontages, and 15% for plottage, all of which resulted in a land value of $492,183.

DAMAGE PARCEL 7:

This property is located at 216th Street and Ninth Avenue to the Harlem River. The land area consists of 98,500 square feet, running from Ninth Avenue towards the Harlem River. It has riparian rights. The court used a value of $2.70 per square foot on Ninth Avenue and $2.15 on West 216th Street, which included an increment of 50 cents per square foot for riparian rights and 50% for corners, 10% for keys, 10% for conjunctive use, and 20% for plottage, all of which resulted in a land value of $254,269.

DAMAGE PARCEL 8:

This property is located between Ninth and Tenth Avenues and running along 218th Street for the entire block front of 500 feet. The damage parcel has over 195 feet frontage on Tenth Avenue and over 307 feet frontage on

Ninth Avenue, containing an area of 125,950 square feet. The court used a value of $3.30 per square foot on Tenth Avenue and $2.45 on Ninth Avenue, adding increments of 50% for corners, 10% for keys, 10% for conjunctive use, 15% for additional frontages, and 15% for plottage, all of which resulted in a land value of $391,650.

DAMAGE PARCEL 9:

This parcel is located on the west side of Boston Road, running through to Crotona Parkway, Bronx. It is an entire block from 175th to 176th Street, containing 49,192 square feet. The court used units of $2 per square foot on Boston Road and Crotona Parkway and $1.25 per square foot on East 176th Street, adding increments of 50% for corners, 10% for keys, 10% for conjunctive use, 15% for additional frontages and 15% for plottage, all of which resulted in a land value of $145,991.

DAMAGE PARCEL 10:

This damage parcel is on the west side of Boston Road, running through to Crotona Parkway, containing an area of 48,774 square feet. The court used a value of $2 per square foot on Boston Road and Crotona Parkway and $2.75 per square foot on Southern Boulevard, adding increments of 50% for corners, 10% for keys, 10% for conjunctive use, 15% for additional frontages, and 15% for plottage, all of which resulted in a land value of $190,420.

DAMAGE PARCEL 11:

This property is situated at 173rd Street and West Farms Road, Bronx, and contains an area of 15,400 square

feet. The court used a value of $2 per square foot, adding increments of 50% for corners, 10% for key, and 10% for plottage, all of which resulted in a land value of $39,536.

DAMAGE PARCEL 12:

This is one of the so-called "Coliseum" properties. It has over 274 feet of frontage on East 177th Street and contains an area of 54,136 square feet. The court used a value of $1.50 per square foot for the front 30,000 square feet and 75 cents for the rearage, and added 20% for plottage, all of which resulted in a land value of $75,722. The court gave no decrement because of the fact that the land was below grade.

DAMAGE PARCEL 13:

This is the second of the "Coliseum" properties. It is 179,462 square feet in area and touches on the Cross Bronx Expressway on the west side and in the rear and also fronts on 177th Street. The court used a value of $1.50 per square foot on the front 50,000 square feet, 75 cents on the next 50,000 square feet, and 65 cents on the rear 79,462 square feet, and allowed an increment of 20% for plottage, all of which resulted in a land value of $196,980.

REPRODUCTION VALUE OF BUILDINGS

Claimants' estimate of the reproduction values of the buildings was the joint effort of Mr. Curtin, a transit engineer, Mr. Healy, a civil engineer and transportation consultant, and Mr. Seaman, a licensed architect who had performed services for claimants over a period of years. None of these gentlemen had any significant experience in

making quantity surveys. It appeared from the testimony that Mr. Curtin determined both the method to be employed in valuing claimants' structures and how those methods would be applied. Their quantity estimation and cost calculation was checked by Mr. Robert, and an additional check on a unit cubage basis was used.

Mr. Sharman was the City expert who made the quantity surveys to determine the reproduction cost new of the buildings. He is the president of a firm actively engaged in construction work in New York City and has had extensive experience in making quantity surveys. He followed standard rules of estimating in reconstructing the buildings from plans on file with the Department of Housing and Buildings. His work was checked by Mr. Cather of DeLeuw-Cather and Co., a prominent appraisal firm specializing in the appraisal of transit systems.

The Court, from experience, is cognizant of the fact that in real estate valuation proceedings, there is a wide difference in the opinions of experts, especially in condemnation proceedings. Reproduction value new is an area where, making due allowance for the difference in expert opinion, one would expect the extent of disagreement to be limited. The standard approach is to determine, by mathematical calculation, the amount of the component building materials a structure contains (quantity take-off) and then apply unit prices for the materials prevailing on the date of condemnation. The difference in the values arrived at by the respective experts in this proceeding is startling. Mr. Sharman's reproduction cost new is $18,019,047. The corresponding claimants' figure 1 of triumvirate Messrs. Curtin, Healy and Seaman is $32,657,191.

The respective values claimed for Damage Parcel 17 is illustrative of this great disparity. Claimants' land—$734,455.00; building—$5,244,200. City's land—$303,000.00; building—$1,797,730. The record indicates that this property was sold by Fifth to one Ed Wagner in November 1954 for $1,000,200 and repurchased by Fifth in March 1959 for $1,550,000.

Cross-examination of the experts indicated omissions or errors in each of the valuations. It is impossible to pinpoint all such errors or omissions, but they do clearly establish the claimants' appraisals are much too high and the City's too low. On balance, I find Mr. Sharman's appraisals to be more trustworthy and have used his reproduction cost new valuations with an upward revision to fix what I deem is a fair reproduction cost new valuation of the structures.

Depreciation

Claimants' method of computing depreciation was devised by Messrs. Curtin and Healy. It was primarily a matter of subjective judgment based upon a detailed physical examination of each structure. Claimants, in their main brief, page 98, describe it as follows:

> "Depreciation as computed by the claimants' experts involved several inter-related computations. First, the depreciable structure aspects of each building were given separate percentage ratings based on (1) a functional analysis and (2) observation of physical condition. These two percentage ratings were combined, with the latter weighing more heavily than the former by a ratio of three to two to obtain an overall

condition rating of the depreciable features of the structure. Then, the mechanical, electrical and fire protection features of the building were each assigned a percentage rating and all three were combined with the overall structural rating, with each element being weighed in proportion to its share of the total construction cost new as determined by the quantity take-off calculations."

In effect, it is a weighted treatment of physical and functional depreciation consisting of five elements: Functional, constructional, mechanical, electrical and fire protection.

In contrast to this method, Mr. Sharman employed the traditional method of determining physical depreciation. After completing his quantity surveys, he applied straight line depreciation to his reconstruction cost new figures. He estimated the buildings should have a life expectancy of 80 to 85 years for general use as *industrial type structures,* and on the basis of their ages at the time of take-over, figured a percentage of depreciation (see Matter of the City of New York [Maxwell], 15 App. Div. 153, page 175). I have adopted this method, which has support in the studies of the life expectancy of buildings, made by and applied by the Interstate Commerce Commission ("Condition Percent Chart", Engineering Section Bureau of Valuation-Accounts 16 and 20). However, I find that the depreciation factor applied by Mr. Sharman is too high, due in great measure to his failure to make proper allowance for the increased life of many of the structures as the result of substantial alterations made over a period of years. The percentage of depreciation, as found by me, for each Parcel is set forth below.

Appendix E cont'd

FUNCTIONAL OBSOLESCENCE

As indicated above, claimants did not consider this factor as a separate element of valuation. The City relied upon Messrs. Anderson and Cather of the firm of DeLeuw-Cather and Co. to determine the functional utility and final value of the buildings for transit operations. Both of these men have had extensive experience in appraising transit systems.

Claimants contend, rightfully, that a certain percentage of obsolescence is directly related to age and is, therefore, necessarily included in Mr. Sharman's factor for depreciation. It should be noted, however, that Mr. Cather recognized a life service of only 50 years for a transit facility. Nonetheless, I believe the factor used by the City is too high, and have modified it to the extent hereinafter indicated.

Accordingly, I find building values for each of the damage parcels which includes tanks, vaults, plumbing and electrical equipment separately appraised by Mr. Wright, the City's expert, as follows:

FIFTH

Damage Parcel 1. This damage parcel is improved with a one-story and mezzanine non-fireproof bus garage erected in 1919.

Reproduction cost new	$ 333,302
Depreciation 50%	166,651
Sound Value	166,651
Functional obsolescence 25%	41,662
Value	124,989

Appendix E cont'd

Damage Parcel 2. This damage parcel is improved with a two-story mezzanine and partial cellar bus garage, formerly a car barn, erected in 1908. There is also a small one and two-story storage building on the south.

Reproduction cost new	$2,627,904
Depreciation 60%	1,576,742
Sound value	1,051,162
Functional obsolescence 20%	210,232
Value	840,930

Damage Parcel 3. This damage parcel is improved with two two-story interconnected bus garages. The south building has a partial cellar and mezzanine. The buildings were originally car barns erected in 1896.

Reproduction cost new	$2,464,046
Depreciation 67%	1,650,910
Sound value	813,136
Functional obsolescence 15%	121,970
Value	691,166

Damage Parcel 4. This damage parcel is improved with a one-story and mezzanine bus garage built around a four-story office and service building and erected in 1938.

Reproduction cost new	$1,967,123
Depreciation 24%	472,109
Sound value	1,495,014
Functional obsolescence 5%	74,750
Value	1,420,264

Damage Parcel 16. This damage parcel is improved with a one-story building with a mezzanine at the north end. It was erected in 1910.

Reproduction cost new	$ 239,186
Depreciation 59%	141,119
Sound value	98,067
Functional obsolescence 30%	29,421
Value	68,646

Damage Parcel 17. This damage parcel is improved with two fireproof buildings. The main building is a three-story and part basement garage with a one-story brick and concrete paint shop addition and a three-story office addition. There is a seven-story and basement annex. The main building was erected in 1917.

Reproduction cost new	$3,955,567
Depreciation 45%	1,780,005
Sound value	2,175,562
Functional obsolescence 15%	326,334
Value	1,849,228

SURFACE

Damage Parcel 5. This damage parcel is improved with a one-story and mezzanine bus garage erected in 1945.

Reproduction cost new	$1,743,681
Depreciation 18%	313,862
Sound value	1,429,819
Functional obsolescence 3%	42,894
Value	1,386,925

Damage Parcel 6. This damage parcel is improved with a one-story mezzanine and partial cellar bus garage erected in 1945.

Reproduction cost new	$1,445,723
Depreciation 18%	260,230
Sound value	1,185,493
Functional obsolescence 3%	35,564
Value	1,149,929

Damage Parcel 8. This damage parcel is improved with a non-fireproof building with cellar and side extension. It was erected in 1896.

Reproduction cost new	$2,228,893
Depreciation 56%	1,248,180
Sound value	980,713
Functional obsolescence 25%	245,178
Value	735,535

Damage Parcel 9. This damage parcel is improved with a one-story bus garage with part cellar and part second floor and a ramp to cellar. It was erected in 1892.

Reproduction cost new	$ 830,644
Depreciation 67%	556,532
Sound value	274,112
Functional obsolescence 25%	68,528
Value	205,584

Damage Parcel 10. This damage parcel is improved with a two-story bus garage with a connected one-story parts building and one-story wing. There is also a one-story boiler room and a one-story machine and repair shop, both connected. The building was erected in 1898.

Reproduction cost new	$ 998,547
Depreciation 56%	559,186
Sound value	439,361
Functional obsolescence 25%	109,840
Value	329,521

Damage Parcel 13. This damage parcel is improved with a one-story and mezzanine bus garage and repair shop, erected in 1929 as a coliseum.

Reproduction cost new	$1,151,209
Deduct 8% for excess height	92,096
	$1,059,113
Depreciation 36%	381,280
Sound value	677,833
Functional obsolescence 15%	101,675
Value	576,158

Damage Parcel 7. This damage parcel is improved with a one-story and mezzanine power house, now used for bus storage. Three additional mezzanine floors have no access and are not in use. The building is about 60 years old. It is agreed that economic value controls. I ascribe a value to this building of $60,000.

Damage Parcel 11. This damage parcel is improved with a one-story partial cellar bus garage erected in 1920. It is presently used for non-revenue vehicles. It is agreed that economic value controls. Adopting a split capitalization method, I find a value for this building of $60,500.

Appendix E cont'd

RECAPITULATION

FIFTH

Damage Parcels	*Land*	*Building*	*Total*
1	$ 226,117	$ 124,989	$ 351,106
2	2,022,172	840,930	2,863,102
3	472,652	691,166	1,163,818
4	640,947	1,420,264	2,061,211
16	65,282	68,646	133,928
17	375,290	1,849,228	2,224,518
Total	$3,802,460	$4,995,223	$8,797,683

SURFACE

5	512,870	1,386,925	1,899,795
6	492,183	1,149,929	1,642,112
7	254,269	60,000	314,269
8	391,650	735,535	1,127,185
9	145,991	205,584	351,575
10	190,420	329,521	519,941
11	39,536	60,500	100,036
12	75,722	—	75,722
13	196,980	576,158	773,138
Total	$2,299,621	$4,504,152	$6,803,773
Fifth	$3,802,460	$4,995,223	$ 8,797,683
Surface	2,299,621	4,504,152	6,803,773
TOTAL	$6,102,081	$9,499,375	$15,601,456

DAMAGE PARCEL 15:

In Proceeding No. 4 the City took a leasehold located at 76-02 Northern Boulevard, Jackson Heights, Queens, for a period of 21 months ending December 31, 1963. The fee-owners of this parcel are Alexander Shannik and the Estate of Joseph Shannik. At the time of condemnation, the claimant, Fifth, was in possession of the premises under lease dated November 7, 1957, expiring December 31, 1968. As a result of the condemnation, the City temporarily replaced Fifth as the occupant of the Jackson Heights garage until December 31, 1963 and the City took outright all of Fifth's personal property located in the premises. The award for this personal property is included in the award given to Fifth for fixtures, equipment, materials and supplies.

The fee-claimant and the tenant-claimant have stipulated that the award made for the value of the acquired period of occupancy and the fixture award for the use of appurtenances during the same period are to be made to the fee-owner. I have fixed a rental of $1.20 per square foot to cover both items. The award is $63,000.

It is conceded that some articles, few in number, were excluded from the appraisals. Claimants' appraisal of these items was an estimate of capital value, not use value, and is, therefore, improper, and the motion to strike this appraisal is granted. If this relatively minor matter cannot be adjusted, the court will take additional testimony with respect to the use value on the hearing of objections.

Fifth has, however, an additional claim, which is allowed, for consequential damage based upon claimants'

incurred liability for their useless "occupancy" of the garage in the amount of $9,276 during the period beginning on January 1, 1964, the first day following the end of the City term and ending on April 30, 1964, the date on which the Shanniks accepted Fifth's surrender of the lease (U. S. v. General Motors Corp., 323 U. S. 373).

Revenue Vehicles
Claimants' Testimony

(1) Fifth

The claimants' expert witnesses with reference to this category of personal property were John F. Curtin and Paul W. Mayer. As previously indicated, the city condemned 844 buses and their appurtenant equipment. These buses are all Diesel-powered, manufactured by General Motors Corporation, and built in the post-war period.

The appraisal is based upon replacement cost as of the condemnation date, with adjustment for depreciation and obsolescence on the bases of age, mileage use, body and mechanical condition. Where the model was not being currently manufactured, the nearest comparable General Motors model was used for the basis of replacement cost. The appraisal was on a bus-by-bus basis, and the condition factor was taken into account in each instance. After consideration of such elements as length of service, total miles operated, total miles operated since engine and transmission renewal or overhaul, respectively, time since last body overhaul, condition of body exterior and interior, and history of inspections by the company's maintenance staff, claimants' experts concluded that the probable life of these

vehicles was 20 years. A formula was devised by Mr. Curtin which assumed a total mileage life of 500,000 miles for the 4506's and 4507's and 600,000 miles for the later models. In applying the factors of age and mileage life, claimants' experts determined the number of months the particular bus was in service up to March, 1962, and related that to 240 months to determine the percentage of age remaining at condemnation. From the records of the companies they obtained the total mileage on the chassis and related that to 500,000 miles or 600,000 miles, depending upon the model of the bus, and determined the percentage of mileage life remaining at condemnation. They then took an average of these two factors and reached a percentage condition of each bus. Percentage of remaining life thus derived was then applied to replacement costs to determine unadjusted depreciated value as of March, 1962.

To this depreciated value, plus or minus adjustments were made for engine and transmission, based on company records on mileage; minus adjustments were also made for body condition.

(2) Surface

The city condemned 1,024 buses and their appurtenant equipment. Ten hundred and seven of these buses were in service at the time of condemnation; 17 were retired prior to condemnation, 12 of which have been disposed of; the remaining 5 retired coaches were appraised at their salvage value. All of them were Diesel-powered vehicles, built in the post-war period by General Motors Corporation and Mack Trucks Inc.

The same method of appraisal was used as in the case of Fifth Avenue. In the case of Mack buses, however, since that company no longer manufactures buses, the nearest equivalent General Motors vehicle was used in deriving current replacement costs. A service life of 16 years was assigned to the buses, and a mileage life of 450,000 miles was used in the application of the formula for deriving the percentage of remaining life.

City's Testimony

The city's expert was Edward A. Roberts, a consulting engineer specializing in passenger transportation, with a broad experience in the actual management and operation of bus lines in New York for many years, in addition to his consulting practice.

He used an engineer-type bus appraisal, but did not use a reproduction cost similar to that established by Mr. Curtin. He claimed he could not justify the use of reproduction cost without some modification, since he was not producing in dollars an equivalent of an old bus but a vastly improved and superior bus. He made allowance for the increased cost of labor and materials in reproducing a GM 4506, for example, *as* a GM 4506 and not as a modern superior model, by averaging the actual cost of that bus with the cost of a "new look" bus.

The principal difference in the engineer-type bus appraisals submitted by the parties lies in the factor of depreciation and service life employed by the respective experts. Mr. Curtin found an age life of 20 years when averaged with a mileage life of 600,000 miles (500,000 for the

GM 4506's and 4507's) would yield the most reliable service life for the purpose of determining value. Mr. Roberts adopted a 14-year service life.

In connection with estimating the service life of the buses, it is important to evaluate the maintenance practices of the operators of claimants' fleets. The testimony disclosed that for a number of years Fifth had the reputation in the transit industry of a well-operated transit system. A similar reputation was never attributed to Surface. However, on the date of the condemnation and for a number of years prior thereto, both Fifth and Surface were beset with labor and financial difficulties which had reduced the efficiency of their maintenance systems to a point where they were definitely substandard (see testimony of witnesses Huffman, Schwartz, Krug, Feldman and Carrano).

The proof established that on the date of condemnation claimants' fleets, by reason of poor maintenance and advanced age, were incapable of efficient operation.

The general experience of the industry, the specific experience of large transit systems as reflected in the studies and reports of the American Transit Association, and the experience in this city of the claimants and the Transit Authority support Mr. Roberts' adoption of a 14-year service life for the buses.

This conclusion is corroborated by the fact that in June, 1961, Mr. Duggan, vice-president of claimants, reported to the board of directors that the age of the fleet was far above normal because of failure to replace buses at a normal rate and that on the basis of a 14-year economic life a reasonable replacement program would require 152 buses per annum. Mr. Duggan also reported to the City Bureau of Fran-

chises that the use of buses 17 years old "is extending the useful life beyond possible economic limits".

I conclude that the evidence supports the soundness of the appraisal practice adopted by Mr. Roberts, that is, to adjust the price of a used bus to reflect expenditures necessary to restore it to sound operating condition. It apparently is the method followed generally in the transit industry. Mr. Mayer, one of the claimants' experts, testified he would never use the procedure employed by Mr. Curtin on adjustments if he were buying buses himself, and Mr. Curtin conceded that he had never made the adjustments he made here in any of his prior appraisals. Nor do I believe any prospective operator-purchaser of a bus fleet would employ such a method.

I believe common sense and reason dictate that the age of a bus presupposes efficiency and proper maintenance during the span of life allotted to it. A new bus, never repaired or overhauled, would certainly never achieve its anticipated life term. Therefore, it follows, standard maintenance does not *add* to the life of a bus, whereas substandard maintenance *reduces* it. The time-life of a bus does not mean that at the expiration of its life period the bus is not capable of operation; it does mean that, despite all the repairs and maintenance it can be given, it cannot be operated *economically* on the required regular runs.

I find the following values for the revenue vehicles:

Fifth	$5,183,838
Surface	$4,518,349

Appendix E cont'd

SERVICE VEHICLES AND EQUIPMENT

The City condemned 37 non-revenue vehicles of Fifth and 67 of Surface and their appurtenant equipment. They consisted of four classifications:

1. Trucks of various types and sizes used primarily for hauling supplies to and between garages;

2. Special body trucks, such as armor plated money vehicles and tow trucks;

3. Snow-fighting vehicles, including sand and salt trucks;

4. Passenger cars used by inspectors, supervisors and officials.

Mr. Allen A. Dahle, who had considerable experience in automotive appraisal work, appraised the non-revenue vehicles for claimants. In the case of passenger cars, he took the "Red Book" value for vehicles of their make, model and age. He stated that the "Blue Book" used in the automotive industry contains prices for many of the standard type trucks, but does not indicate the market value of trucks, bodies or chassis manufactured prior to 1956. Accordingly, after consultation with Mr. Curtin, he used a reproduction cost of a new and modern vehicle. The result of this method caused some surprising valuations; snow plows, for example, manufactured in 1935 were given 30-year lives, while 1948 models were given 20-year lives and an old vehicle given an appraised value greater than the "Blue Book" value for a 1956 model.

Mr. McMahon, who is the City's expert on this type of equipment, indicated a very limited experience with appraising special equipment of the kind involved here. His method of evaluating these vehicles was to take the original cost and to depreciate that on the straight line basis over what he regarded as the probable useful life of the vehicle. However, considering the limited yearly use of certain of the special equipment (snow plows, salt spreaders) he employed a useful life which was too low.

The Court cannot accept either appraisal. From the examination of the exhibits and the testimony, I have determined the following values to be just:

Fifth	$72,000.00
Surface	$82,000.00

FARE REGISTERING DEVICES

(commonly called fare boxes.)

The City condemned 1332 fare boxes of Fifth and 1311 fare boxes of Surface. Fifth's consisted of 431 Grant Electrofarers, 28 Grant Money Meters, 28 Rockwell Fare-O-Matic Registers, 10 Johnson K-9 Registers, and 835 Johnson types A, O, D and earlier model fare boxes. Surface had 286 Grant Electrofares, 30 Rockwell Sort-O-Matic Registers, 5 Johnson K-9 Registers, 977 Johnson type D. M. 2 Fare Boxes and 13 Perrey Turnstiles.

Mr. Peacock was the claimant's appraiser. His method was reproduction cost, depreciated on a straight line basis over a 25-year useful life he fixed for the fare boxes. He arrived at reproduction costs by taking the current cost

of the same or similar new model fare box and then made an adjustment for an age and mechanical condition.

Mr. Robert McMahon was the City's appraiser of the fare boxes. He appraised them on what he asserted was the actual market value for "used" fare boxes. He based his value on information he received from bus operators and drivers in transit equipment. The scope of the information he received was extremely limited and completely failed to establish the existence of an available market for used fare boxes in the quantities here involved.

Mr. Peacock, however, improperly valued the fare boxes by attributing to them features of current models which are vastly superior in design and performance. Many of the fare boxes are of ancient vintage (1945-1952) and types and models which were no longer being manufactured (Rockwell Fare-O-Matic; Johnson D Fare Box) or for which parts could not be obtained. I find no justification for the 25-year life span adopted by Mr. Peacock. For example, when old boxes were rebuilt and motorized in 1952, he started them on a new 25-year life span as of the time of rebuilding. 580 D. M.—2 Boxes, models which had been discontinued in 1950, and for which parts were unavailable were treated to the same life span, and when a Johnson box manufactured in the 1930s and discontinued in 1940, was motorized in 1946, it, too, was granted a 25-year life.

50 Fare Registers of Fifth and 156 of Surface were classified as unserviceable in the inventory taken by the parties. It appeared that Mr. Peacock had no knowledge of the condition of these fare boxes but assumed they all could be rendered serviceable at a repair cost of $8.00 per

box and be given an extended service life. I find no support for this conclusion. I find the following value for the fare boxes:

Fifth —$125,000.
Surface—$100,000.

Fixtures and Personal Property

Pursuant to court order, the Transit Authority undertook the making of an inventory of all furniture, machines, tools, bus parts and other personalty condemned by the city. The claimants were authorized to be present while the inventory was being completed and their appraisal substantially follows the form of the inventory with the addition of a supplement containing certain items which had been omitted by the Transit Authority. The inventory itself was over 4,700 pages and contained over 140,000 items.

Claimants' appraisal of the personalty here involved was prepared primarily by its expert witness, Thomas E. Peacock. His over-all appraisal includes the separate appraisals of certain heavy machinery by claimants' witness, Sidney L. Gaynes, and of the law library by claimants' witness, Walter Ford.

The City's appraisal of the personalty was made by several appraisers and submitted in several separate exhibits. The City's expert, Gilbert Wright, appraised machinery and equipment; Robert G. McMahon appraised the bus parts; Bernard D. Reicher prepared the appraisal of fixtures which was endorsed and presented at the trial by the City's witness, Samuel H. Cohen and Milton Hirschman appraised the law library.

Appendix E cont'd

The total dollar value of the reproduction cost new of all such personalty as submitted by the claimant companies is approximately $8,200,000.00, of which approximately $3,850,000.00 is attributable to Fifth and approximately $4,350,000.00 attributable to Surface. The reproduction cost new is claimed by the City to total approximately $7,100,000.00, of which approximately $3,250,000.00 is attributable to Fifth and approximately $3,850,000.00 attributable to Surface.

Of the approximately $1,100,000.00 differential in reproduction cost new, something over $400,000.00 may be attributed to items which were deemed scrap or obsolete by the City's experts and apparently valued at 1 per cent in appraising the sound value of the personalty. It is the claimants' contention that the differential balance of almost $700,000.00 may be found in items omitted by the City's appraisers or treated as junk.

The sound value of all of this category of personalty is claimed by the City to be $3,464,106.39, of which $1,647,301.55 is attributable to Fifth and $1,816,804.84 to Surface. The claimants' sound value appraisal totals $5,734,681.24, of which $2,763,858.17 is attributable to Fifth and $2,970,823.07 to Surface.

All figures cited above include the appraisals for damage parcels 14 and 15.

In determining its sound value figures, the claimants, after having depreciated the reproduction cost new of items other than "new" items, added a 15 per cent increment to certain "controlled stores in recognition of their increased worth because of their availability in organized storage". The increment, applied to stores having a claimed sound

value of $1,434,756.47, amounts to $215,213.47. Also included in claimants' appraisal was the supplemental list of items mentioned above which were alleged to have been omitted in the Transit Authority inventory. These items, which were appraised by claimants, at a sound value of $299,098.00, were included in Mr. Wright's appraisal of the machinery and equipment for the City. Claimants further included some 31 items which were allegedly omitted because they were being repaired off the premises, having a claimed sound value of $4,197.00.

It is clear from the record that claimants' witness Peacock determined reproduction cost new primarily from claimants' record cards, inventories and manufacturers' catalogues. Generally, he then depreciated these items by 30 per cent (70 per cent remaining value) if "serviceable" and 60 per cent (40 per cent remaining value) if "unserviceable". "New" items were valued at 100 per cent of the reproduction cost new. With relatively few exceptions Peacock followed the designation of the Transit Authority inventory in categorizing items as "new", "serviceable", or "unserviceable". It is undisputed that Peacock did not personally examine the great bulk of those items which he appraised.

Claimants' witness Gaynes, who appraised certain heavy machinery, did so without reference to the Transit Authority inventory, inspecting and appraising each item individually. After having submitted his appraisal of the "replacement cost of used machines today reconditioned and delivered", Gaynes submitted a further appraisal of the reproduction cost new of the machinery.

Appendix E cont'd

As pointed out above, the City's appraisal of the personalty was made by several experts. The witness Wright appraised the reproduction cost new of the machinery and equipment (including a quantity of stored oil and certain pumps and dispensing units) at $1,334,155.57. His sound value appraised totaled $641,689.94, of which $226,588.14 is attributable to Fifth and $415,101.80 attributable to Surface. Of the total sound value, $167,918 represents items appearing in the separate appraisal of claimants' witness Gaynes and $258,524 represents items found in claimants' supplement to the Transit Authority inventory.

Wright testified that his sound value was arrived at after he "looked at these things physically and formed my opinion of the value there", without considering the age of the particular item. The witness testified that he considered the functional obsolescence of the machines he appraised.

The City's witness McMahon appraised the bus parts at $3,606,921, representing reproduction cost new. This figure is exclusive of all used parts valued only as "scrap" but inclusive of $95,746 worth of new material deemed obsolete by McMahon although not marked as obsolete on the Transit Authority inventory. In arriving at his sound value appraisal, McMahon generally appraised the bus parts in accordance with the designation assigned to them on the Transit Authority inventory. He appraised "new" items at full value but for the most part depreciated "serviceable" items by 75 per cent (25 per cent remaining value) and "unserviceable" items by 90 per cent (10 per cent remaining value). He further valued the new parts which he deemed obsolete, as set forth above, at 1 per cent of

their reproduction cost new and allowed a total scrap value to other parts of $4,169.35. McMahon's total sound value appraisal was $1,509,599.46, of which $621,383.94 is attributable to Fifth and $888,215.52 attributable to Surface.

McMahon, who testified he inspected some of the claimants' garages after condemnation and also inspected certain maintenance records, arrived at the conclusion that claimants' maintenance standards were poor. He stated that this opinion of the maintenance standards led him to depreciate serviceable bus parts by 75 per cent. He admitted that a "properly" rebuilt engine, for example, would be appraised not at 25 per cent but at 50 per cent of its reproduction cost new. McMahon supported his conclusion that claimants' maintenance was poor by testifying that having examined certain maintenance records, he found that many buses which operate 32,000 miles in a year had two or three engines in them during the course of the year, and "the engine only runs 10,000 miles, something is wrong * * * with the method, that is exactly my basis for giving them 25 per cent on that rebuilt engine". McMahon gave no increment in value for controlled stores.

The appraisal of the fixtures by the City's witness Cohen (the appraisal was in fact drawn by Mr. Reicher, although adopted and submitted by Cohen) shows a total reproduction cost new of $2,017,394.96. In this appraisal the City used the claimants' property cards in pricing the various items contained therein and depreciated the items based upon personal observation and inspection. There was no cross-examination by the claimants into the method of valuation in this category, and the total sound value submitted

by the City was in the amount of $1,292,308.99, of which $778,821.47 is attributable to Fifth and $513,487.52 to Surface.

It is apparent that here again the parties differ substantially in their estimates of reproduction cost new and greatly in the final appraised sound value. I am again unable to accept either of the appraisals. Having examined the Transit Authority inventory, the appraisals and methods of valuation as reflected in the testimony and exhibits, I find that a proper reproduction cost new appraisal of this personalty would value it at $7,750,000.00, of which $3,526,250.00 is for Fifth and $4,223,750.00 for Surface. Included in this total figure is $250,000.00, representing the reproduction cost new of used items which are either obsolete or of junk value only and which the court deems worthy of evaluation for award purposes only as scrap.

Where possible and readily applicable, it is the court's belief that the items of personalty here involved should be valued, as certain of the witnesses have done, by groups according to their appropriate categorical delineation, i.e., "new", "serviceable", or "unserviceable". All of this personalty is not subject to such a breakdown. Therefore, it is necessary to deduct from the over-all reproduction cost new total of $7,750,000.00 those items which may not readily be appraised by category as set forth above. Excluded, to be appraised separately, are the machinery items appraised by Mr. Wright (at approximately $509,000.00 reproduction cost new) for the City and by Mr. Gaynes (at approximately $619,000.00 reproduction cost new) for the claimants. The court concludes here that $575,000.00 is a proper appraisal of the reproduction cost new. Also

excluded is the law library, which the court values at $23,500.00. Excluded lastly are those items not originally included in the Transit Authority inventory and supplementally appraised by claimants at approximately $493,000.00, reproduction cost new, while being appraised by Wright in his over-all machinery and equipment appraisal at approximately $441,000.00, reproduction cost new. The court values these items at $460,000.00, reproduction cost new.

Having substracted these amounts (totaling $1,058,500.00), the resultant sum of $6,691,500.00, therefore, represents reproduction cost new of the personalty which the court will value by appropriate category—"new", "serviceable", and "unserviceable". Of the total amount, $3,111,750.00 is attributable to Fifth ($205,000.00 of which is found in Damage Parcel 14) and the balance of $3,579,750.00 is attributable to Surface.

The court further finds that those items classified as "new" should be valued at 100 per cent of reproduction cost new, "serviceable" items at 50 per cent, and "unserviceable" items (susceptible of repair) at 20 per cent. Scrap items will be valued at 1 per cent of reproduction cost new.

Of the total reproduction cost new of $3,111,750.00 attributable to Fifth, $920,000.00 is for "new", $1,541,250.00 for "serviceable", and $650,500.00 for "unserviceable". Of the last figure for "unserviceable" items, the court includes $62,500.00 for scrap. Applying the appropriate percentages of depreciation above set forth, we arrive at a sound value of $1,808,850.00 for Fifth. Of this amount $140,000.00 is awarded for Damage Parcel 14.

Of the total reproduction cost new of $3,579,750.00 attributable to Surface, $1,085,000.00 is for "new", $1,250,500.00 for "serviceable", and $1,244,250.00 for "unserviceable". Of the last figure for "unserviceable" items, the court includes $187,500.00 for scrap. Again applying the appropriate percentages of depreciation, we arrive at a sound value of $1,923,475.00 for Surface.

We turn now to those items which were excluded from the above calculation. Comparing the appraisals of the machinery items (which the court has valued at $575,000.00, reproduction cost new), we find a vast difference in the sound values allotted. Claimants' witness Gaynes values the property at approximately $330,000.00 while the City's witness Wright values it at approximately $171,000.00. Both men personally inspected and appraised the items. Mr. Gaynes' appraisal reflects a direct evaluation without regard to the reproduction cost new of the items, while Wright depreciated from the cost new as obtained in manufacturer's catalogues and claimants' records. Gaynes, however, appraised the machinery on a reconditioned basis, while admitting he did not see all of it in operation and did not "go into each machine to see if it was in need of repair". Further, a comparison of Gaynes's field notes with his final appraisal reveals many instances of unexplained upgraded values.

I conclude that Mr. Wright's appraisal more nearly reflects the appropriate sound value of these machinery items, which are determined to total $225,000.00, of which $85,000.00 is awarded to Fifth and $140,000.00 to Surface.

Regarding those items valued supplementary to the original Transit Authority inventory, the sound value ap-

praisals by Peacock ($299,098.) and Wright ($258,524.) are relatively closer to each other, than any other appraisals in the proceeding. I conclude that the appropriate sound value is $270,000.00, of which $75,000.00 is awarded to Fifth and $195,000.00 to Surface.

With regard to claimants' 15 per cent increment for its controlled stores (found primarily at the Coliseum, 132nd Street and 100th Street), I am of the opinion that the testimony regarding the value of these stores does not justify so large an increment. I agree, however, that some additional value should be placed on such organized stores and estimate it to be 5 per cent. Claimants' witness Peacock testified that the sound value of these stores is approximately $1,435,000.00. Having examined claimants' listing (with values) of the items allegedly subject to such increment, I conclude that the appropriate sound value of these stores is $1,075,000.00 and the increment is $53,750.00, of which $24,150.00 is attributable to Fifth and $29,600.00 to Surface.

It should be noted that in determining both reproduction cost new and sound value, I have included at full value those items found at the Coliseum and 132d Street designated as "new" on the Transit Authority inventory and totaling $95,746.00—which the City alleged to be obsolete and valued at only 1 per cent. The items involved were not identified, and McMahon's testimony that the parts were obsolete as usable only for obsolete buses was based on the opinion given to him by a MABSTOA employee. The bare allegation by the City's witness that another told him that a group of unidentified parts were obsolete does not justify the City's conclusion in this regard.

Appendix E cont'd

Further, the sound values arrived at include those items which were off the premises, being repaired, at the time the Transit Authority inventory was taken.

RECAPITULATION

FIFTH

Items appraised by category	—	$1,808,850.00
Machinery items	—	85,000.00
Supplemental items	—	75,000.00
5% increment (controlled stores)	—	24,150.00
Library	—	23,500.00
Total to Fifth	—	$2,016,500.00*

* The total includes $140,000.00 awarded for D. P. 14.

SURFACE

Items appraised by category	—	$1,923,475.00
Machinery items	—	140,000.00
Supplemental items	—	195,000.00
5% increment (controlled stores)	—	29,600.00
Total to Surface	—	$2,288,075.00
GRAND TOTAL	—	$4,304,575.00

Appendix E cont'd

Personal Property

Accessories to Revenue Vehicles

and

Miscellaneous Equipment

Accessory equipment includes such items as destination signs, batteries, fire extinguishers, advertising frames, all of which can be installed in the buses at the time of purchase or later. These items were not included in claimants' appraisals of the buses but were treated by them as a separate category, and were included as exhibits 15 and 16 in claimants' supplemental claims and proofs of title served on the City in December, 1962.

The City claims that these items were integral parts of the buses. I find no testimony to support this contention. Mr. Peacock, claimants' appraiser, testified that claimants' invoices showed the original cost of the buses did not include these accessories. Two of the principal items are destination signs installed on the front and right-hand side of each coach. In 1959, Fifth and Surface bought new destination signs for their respective fleets paying $120.20 for a set of four signs. The City condemned 843 sets belonging to Fifth and 1007 belonging to Surface.

In 1960 and 1961, both companies installed outside advertising frames on their respective buses for which they make claim.

Batteries which were installed in the condemned buses and a certain number in reserve, constitute a large item in this category of personal property; 2312 belong to Surface, 1917 to Fifth. At the date of condemnation these batteries

were furnished to claimants by the United States Rubber Company, pursuant to rental agreements which provided that title to the batteries would vest in claimants upon the termination of the agreements.

Based on the testimony and the exhibits, I conclude a just compensation for the accessories and miscellaneous equipment to be:

FIFTH

Accessories to Revenue Vehicles	—	$ 90,000.00
Miscellaneous equipment	—	23,000.00
Total	—	$113,000.00

SURFACE

Accessories to Revenue Vehicles	—	$ 95,000.00
Miscellaneous equipment	—	28,000.00
Total	—	$123,000.00

EXPERT TESTIMONY

The court, in determining the valuation of claimants' tangible property condemned by the city, was compelled to weigh and evaluate the testimony of the numerous experts called by the respective parties. In but few instances was I able to fully adopt the proffered opinions, but I gave greater weight to the opinions of those experts whose testimony I found more convincing and to a greater degree supported by the facts upon which the opinions were based.

The following statement of Mr. Justice STEUER in *Matter of City of New York (Maxwell)* (15 A D 2d 153, 173, *supra*)

is singularly applicable to this situation: "Likewise, the city's claim that the court must have followed the claimant's theory because the award exceeded the city's estimates is baseless. This type of argument has the one advantage of respectable age. Forty years ago it was written: 'The mere fact that the court did not accept the testimony of the city's experts as to value does not show that he was influenced by the fanciful and speculative plan presented by the claimants' (PAGE, J. in *Matter of City of New York* [*Inwood Hill Park*], 197 App. Div. 431, 435—an opinion notable not only for good law but for its literary allusions)."

CONSEQUENTIAL DAMAGES

As noted at the outset, claimants seek consequential damages of $19.5 millions in addition to the value of the tangible assets. These consist of $9.4 millions for pensions; $5.2 millions for insuring liability in regard to street railway tracts and for repaving the area; $4.3 millions for tort claim administration; and $0.6 million for workmen's compensation and liabilities.

There is a dispute as to whether claimants have any liability in respect of the street railway tracks and the appurtenant area.

While claimants admit that they are liable for payment of pensions to employees who have retired, they disclaim liability to those who have not retired. Nevertheless, the city introduced the testimony of Mr. Ain, an actuary, to establish the cost of such pensions to nonretired persons. This testimony is excluded as immaterial. The court does not express any opinion as to claimants' liability respect-

ing any of these items, because it is clear that even if they are liable, such liability is not an element of compensation in eminent domain.

Claimants disregard the fundamental distinction between *severance* damage, where only a portion of property is taken and compensation must be paid for the resultant damage done to the portion not taken, and *consequential* damages, where all of a property or business is taken and claim is made for compensation for subsisting contractual liabilities of the condemnee.

Severance damage (sometimes loosely called "consequential" damage) is compensable. That is the basis of the holding in *Matter of Gillespie (Central Hudson Gas & Elec. Corp.)* (263 App. Div. 175, affd. 288 N. Y. 514). The court held that result mandated by the Federal and State constitutional requirements of just compensation. But the court pointed out further (263 App. Div. 175, 177, 179) that the governing statute (title K of chapter 41 of the Administrative Code of the City of New York) specifically provided that (a) when real estate used for electric power lines, for example, was condemned by the Board of Water Supply, the electric corporation "shall not directly or indirectly be subject to expense, loss or damage by reason of changing such route or location, but that such expense, loss or damage shall be borne by the city" (§ K41-26.0), and "where loss, damage or expense, direct *or consequential,* has resulted to • • • any electric corporation • • • the commissioners of appraisal • • • are hereby • • • directed to pass upon such claim and to make awards therefor as provided in this article" (§ K41-13.0) (italics supplied). No such provisions are found in the condemnation statute here.

Consequential damages, however, as defined above, are not compensable. This distinction is pointed out in *United States* v. *Miller* (317 U. S. 369, 376, *supra*): "If only a portion of a single tract is taken, the owner's compensation for that taking includes any element of value arising out of the relation of the part taken to the entire tract. Such damage is often, though somewhat loosely, spoken of as severance damage. • • • As respects other property of the owner consisting of separate tracts adjoining that affected by the taking, the Constitution has never been construed as requiring payment of consequential damages" (footnotes omitted).

In *United States ex rel. T. V. A.* v. *Powelson* (319 U. S. 266, 281-282) the court said: "This public project, to be sure, has frustrated respondent's plan for the exploitation of its power of eminent domain. We may assume that that privilege was a thing of value and that this frustration of the plan means a loss to respondent. But our denial of compensation for that loss does not make this an exceptional case in the law of eminent domain. There are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth Amendment. The point is well illustrated by two other lines of cases in this field. It is a well settled rule that while it is the owner's loss, not the taker's gain, which is the measure of compensation for the property taken (*United States* v. *Miller, supra; United States* v. *Chandler-Dunbar Co., supra,* p. 81; *Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189, 195), not all losses suffered by the owner are compensable under the Fifth Amendment. In absence of a statutory mandate (*United States* v. *Miller,*

supra, p. 376) the sovereign must pay only for what it takes, not for opportunities which the owner may lose. See Orgel, Valuation Under Eminent Domain (1936) § 71, § 73. On the one hand are such cases as *Monongahela Navigation Co.* v. *United States, supra,* where it was held that the United States had appropriated a going enterprise to its own ends and must make compensation accordingly. But it is well settled in this Court that, 'Frustration and appropriation are essentially different things.' *Omnia Co.* v. *United States, supra,* p. 513." (Footnotes omitted.)

In *City of Yonkers* v. *A. & J. Cianciulli, Inc.* (117 N. Y. S. 2d 792) the city took a permanent easement and a temporary easement in the condemnee's lot, for the purpose of building a sewer. The commissioners made an award "for increased cost of construction of a building upon the lot in question and for loss of rental income of completed building claimed to have been sustained by owner because of delay in construction due to pendency of the sewer improvement and of this proceeding to condemn" (p. 794). In disallowing that award, EAGER, J., said (pp. 798-799): "The contention of respondent that the awards for the increased cost of construction of its building and for loss of rental income is authorized by the decision in South Buffalo Ry. Co. v. Kirkover, 176 N. Y. 301, 68 N. E. 366, is not believed to be sound. This decision holds as a general proposition that the commissioners of appraisal are required to award the owner a sum that will fully indemnify him as to his proximate and consequential damages. In this connection, the consequential damages that may be the basis of an award in condemnation proceedings consist generally of the diminution in value of the remainder of the owner's

property occasioned by the taking of a portion thereof or an easement therein and occasioned by the use to which the portion or easement taken is put by the condemnor. The consequential damages which may be awarded under a statute requiring just compensation for the property taken are the damages resulting from the direct taking *to the remainder of the property of the owner.* See, Van Aken v. State, 261 N. Y. 360, 185 N. E. 497; Coffey v. State, 291 N. Y. 494, 53 N. E. 2d 362; Culver Contracting Corp. v. Humphrey, 268 N. Y. 26, 196 N. E. 627. The alleged incidental losses sustained in the case at bar by the respondent owner in its building venture, did not result directly from the taking and use of the easements but are alleged to have been caused by a delay in the improvement and in the institution and maintenance of the condemnation proceedings. They are not deemed to be consequential damages directly flowing from the taking itself" (italics in original).

In *Omnia Co.* v. *United States* (261 U. S. 502) the facts were as follows (p. 507):

"The appellant, on May 19, 1917, by assignment, became the owner of a contract, by which it acquired the right to purchase a large quantity of steel plate from the Allegheny Steel Company, of Pittsburgh, at a price under the market. The contract was of great value and if carried out would have produced large profits.

"In October, 1917, before any deliveries had been made, the United States Government requisitioned the Steel Company's entire production of steel plate for the year 1918, and directed that company not to comply with the terms of appellant's contract, declaring that if an attempt was made

to do so the entire plant of the Steel Company would be taken over and operated for the public use."

In denying any recovery, the court said, per SUTHERLAND, J. (pp. 513-514):

"In the present case the effect of the requisition was to bring the contract to an end, not to keep it alive for the use of the Government.

"The Government took over during the war railroads, steel mills, ship yards, telephone and telegraph lines, the capacity output of factories and other producing activities. If appellant's contention is sound the Government thereby took and became liable to pay for an appalling number of existing contracts for future service or delivery, the performance of which its action made impossible. This is inadmissible. Frustration and appropriation are essentially different things.

"There is nothing in *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, or in the other cases cited by appellant, which in any way conflicts with what we have said.

"In the *Monongahela Case* the property which was taken was a lock and dam, built by the company, pursuant to the invitation of the United States and the State of Pennsylvania, the latter, in consideration, giving the company a franchise to exact tolls. The franchise, therefore, was not merely a contract in respect of the property taken, but was an integral part of it, and this Court (p. 329) said:

"'So, before this property can be taken away from its owners, the whole value must be paid; and the value depends largely upon the productiveness of the property, the franchise to take tolls.'

"The lock and dam constituted, in effect, a going concern, whose value was of course affected by what it would produce. Moreover, the case rested primarily upon the doctrine of estoppel, as this Court has in several cases since pointed out."

See, also, *United States* v. *Certain Lands in Borough of Manhattan* (332 F. 2d 679, 336 F. 2d 1021 [2d Cir.]).

Claimants contend that they are entitled to these consequential damages because "each represents expenses properly charged to revenues which, but for the condemnation, would have been received after March 21, 1962, and since the City did not assume such expenses, claimants have sustained damage." These items might properly be chargeable to revenues as a bookkeeping matter while a corporation continues in business, but they are not obligations which a purchaser is required to assume.

The city is paying all current operating expenses. It may not be charged with these deferred expenses attributable to obligations assumed by the condemnee prior to condemnation. The city would certainly not be liable to continue payments which claimants might be obligated to make under long-term employment contracts with executives whom the city did not continue in its employ, nor to fund a pension plan which claimants failed to fund during the employment period. There is no difference in principle between such obligations and the liabilities involved in these claims.

An analogous problem was presented in *Mullen Benevolent Corp.* v. *United States* (290 U. S. 89). A municipality had issued to petitioner improvement district bonds to cover construction of sewers and sidewalks. The statute

provided that if the original assessments on the adjoining properties were insufficient to meet the carrying charges on the bonds, the municipality must reassess in the necessary amount; if the municipality failed to collect such reassessments, the bondholders could do so. The United States acquired all the real property in the improvement districts, some by purchase and some by condemnation. There was a deficiency in the bond payments, which would have been taken care of by the reassessments but for the acquisition of the real property by the United States. The court held that petitioner could not recover this deficiency from the Government, saying (pp. 94-95): "The petitioner insists that the bonds are property and were in legal effect taken by the respondent. The argument is that the sole source of payment was a reassessment upon the lots in the improvement districts, and as the action of the respondent rendered such procedure vain, the United States as effectually destroyed the chose in action as if it had seized the instruments evidencing the right. But the bonds were not taken. At the date of acquisition by the Government the real estate was subject to be assessed in the future for sundry taxes, amongst them taxes in the nature of reassessments for sewers and sidewalks. It is true these could not thereafter be levied on property which had passed to the United States, but this does not mean that the Government appropriated the right to assess them *in futuro,* nor that it took the benefit which might accrue to bondholders consequent on such future levies. By purchase of the lands the United States at most frustrated action by the city to replenish the assessment fund to which alone the bondholder must look for payment of his

bonds. But this was not a taking of the bondholder's property. *Omnia Commercial Co.* v. *United States,* 261 U. S. 502."

Claimants argue that "these items were operating expenses recoverable from the fare box and should follow the fare box into the City's hands." This disregards the stark fact that the fare box was progressively becoming less able to take care of even the current operating expenses, leaving nothing available for these expenses attributable to past operations.

As stated under "GOOD WILL" (*supra*), for 1961, Fifth had a deficit of $300,000 after taxes, and Surface had a net income of $90,000 after taxes; for the past three years, the average net income after taxes was $27,000 for Fifth and $552,000 for Surface. The situation was getting even worse. It is not apparent how such an emaciated fare box could pay out $19.5 millions of accumulated obligations. If the properties had not been condemned when they were, these obligations would have increased.

Claimants argue finally that "the price which willing buyers and sellers would arrive at for the claimants' assets would be raised if, as here, the liabilities were left with the seller."

A willing buyer would pay no more than the fair value of the *net* assets which he gets. I have found the fair value of claimants' properties to be $30,232,494. If a buyer took them free of liabilities, as here, that is all he would pay for them. If he took them subject to liabilities of $19.5 millions, he would pay only $10.7 millions therefor. No semantic legerdemain can alter that result.

Appendix E cont'd

During the trial certain testimony and exhibits were received subject to motions to strike. Except as heretofore otherwise indicated these motions are denied.

THE FOLLOWING ARE THE AWARDS:

FIFTH

Land	$ 3,802,460
Buildings	4,995,223
Revenue vehicles	5,183,838
Nonrevenue Vehicles	72,000
Other personalty	2,254,500
Damage Parcel No. 15 (Jackson Heights leasehold)	9,276
TOTAL FIFTH	$16,317,297

SURFACE

Land	$ 2,299,621
Buildings	4,504,152
Revenue vehicles	4,518,349
Nonrevenue vehicles	82,000
Other personalty	2,511,075
TOTAL SURFACE	$13,915,197

CLAIM OF BANKERS TRUST COMPANY

Bankers Trust Company, acting as agent for itself and other banks, filed notices of claim and proofs of title showing a total amount of $2,689,999.90 as the balance of principal due on the date of vesting of title in the city, under

certain conditional sale contracts covering 230 omnibuses taken in the proceeding. The city stipulated that appraisals made by and on behalf of the city indicate that the aggregate value of the 230 omnibuses is at least that amount, such value being specifically allocated among the five proceedings involved. The claim is allowed in the amount of $2,689,999.90.

INTEREST ON THE AWARDS should be computed at 4% (see opinion BOTEIN, P. J., in *Matter of City of New York* [*Maxwell*], 15 A D 2d 153, 178-182).

APPENDIX F

Opinion Below of Hecht, *J.*, After Hearing on Objections

(Caption omitted)

MATTER OF CITY OF N. Y. (Fifth Avenue Coach Lines, Incorporated)—Upon objections to the tentative decree, claimants argue that they have proved that they are capable of profitable operations, and the city argues that it has established that claimants should be valued as a non-operating transit system. These arguments, in effect, seek reconsideration of the legal conclusions in the opinion.

I adhere to the conclusions expressed, for the reasons stated in the opinion. In view of its length, the reasoning will be briefly recapitulated here, even at the risk of some repetition.

Claimants seek, in addition to the value of their tangible assets, a value for good will, or for the monies expended for training personnel, developing systems, and the like. The cases relied on by claimants indicate that, to establish such a value, they must show a history of profitable operations (Kimball Laundry Co. *v.* U. S., 338 U. S. 1, 16; Des Moines Gas Co. *v.* Des Moines, 238 U. S. 153, 165; Monongahela Navigation Co. *v.* United States, 148 U. S. 312, 328; National Waterworks Co. *v.* Kansas City, 62 Fed. 853, 865 [Brewer, J.]; Bonner Milling Co. *v.* State of New York, 240 N. Y. 533, 539).

Such a history does not exist in this case. Claimants' average post-tax income for the last three years was

$579,000,—a return of less than 2 per cent on the valuation found.

Their average post-tax income for the last ten years was not stated. But their average *pre-tax* income for that period was $3.2 millions.

In view of this concededly unimpressive earnings record, claimants have resorted to the argument that value should be assigned to the above-described intangibles because claimants are "capable of profitable operation." This novel argument is based on the language in Matter of City of New York (Sixth Ave. El. R. R.), 265 App. Div. 200.

As noted in the opinion, that case has no application here. The record there was barren of any proof of actual earnings, because Sixth Avenue had been operated as an integral part of the Manhattan Railway system. The court therefore remanded for proof as to whether Sixth Avenue was capable of profitable operation as a separate entity. This proof would depend in large part on Sixth Avenue's actual earnings on a segregated basis.

Assuming arguendo that a value should be assigned to claimants' intangibles, if they could prove capability of profitable operation in the future despite their dismal past, they have failed completely to discharge their burden of proving such capability. "The actual experience of the company is more convincing than tabulations of estimates. * * * Elaborate calculations which are at war with realities are of no avail" (Hughes, C. J., in Lindheimer *v.* Illinois Telephone Co., 292 U. S. 151, 163-4). "Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be

excluded from consideration. * * * " (Butler, J., in Olson *v.* United States, 292 U. S. 246, 257).

Claimants tried to show first that they could effectuate substantial economies in operation. I did not find this testimony credible. On the contrary, the proof indicates that their costs would increase because of the advanced age of their buses and the large amount of deferred maintenance.

Claimants then tried to show that they would obtain a higher fare. This effort failed for three reasons, any one of which would be sufficient.

First, claimants would lose a substantial portion of their patronage if they tried to increase their 15 cents fare while the city's rapid transit system retained that fare. Claimants have not proved a reasonable probability of an increase in the rapid transit fare. And even if there were such an increase now, it would have no bearing on the value of claimants' business when the taking occurred in March 1962, two and a half years earlier.

Secondly, even if we accept claimants' argument that they could not be compelled to continue operations at a non-compensatory fare, the city could require them to surrender their franchise if they declined to adhere to the 15 cents fare stipulated in the franchise.

Thirdly, even if claimants would have the right to retain their franchise despite an increased fare, the base on which such fare would be fixed would be the capital actually invested, which is only $18.6 millions. Under no circumstances would they be entitled to a return on more than the present value of their real estate, and the sound value of their garages, buses, and fixtures (Matter of New

York Telephone Co. *v.* Public Service Commissioner, 309 N. Y. 569). I have found that value to be $30.2 millions, the amount of the award.

As to the city's contention: We assume arguendo that if the city discontinued its payment of school fares, and insisted on full franchise taxes and adherence to the 15 cents fare, claimants might be driven into bankruptcy and the city might then be able to buy their properties at the valuation applicable to a non-operating transit system. But such a course of conduct would offend all sense of fair-dealing. And it would flout the legislative finding which the city sought and on the basis of which it has exercised the instant condemnation—that "the continued uninterrupted adequate, efficient and safe operation of omnibus (in such cities) is essential to the health, welfare and safety of the inhabitants of such cities * * *" (Laws of 1962, ch. 161, italics supplied) [sic].

The plain fact is that the city was able to walk in on the date of condemnation, and continued to operate this transit system without interruption, just as it had been operated up to condemnation. It is unrealistic to say that the subject of condemnation was not an operating transit system. The fact that the buses were under-maintained was given effect in the valuation assigned to them.

Claimants' objections to specific items of valuation will now be considered.

1. One of the objections made by claimants to the court's award for real estate is based on the failure of the court to give a 15 cents increment for additional frontages for Damage Parcels 2 and 4. Examination of the record

indicates that both these parcels have three frontages. The court allowed a 10 per cent increment for Damage Parcels 1 and 16 which have two frontages, and a 15 per cent for Damage Parcel 6 which has three frontages. Accordingly, this objection is sustained and the awards for Damage Parcels 2 and 4 are modified to the extent of allowing increments of 15 per cent instead of 10 per cent. The awards are increased to $2,114,000 for Damage Parcel 2, and $670,089 for Damage Parcel 4.

2. Claimants point out that two of their garages were found to have an economic value higher than their sound value, and urge that they are entitled to such higher valuation for these two garages. But this would be inconsistent with the going concern concept which I accepted in allowing the aggregate award for the twelve garages on a sound value, which was much higher than the aggregate award would have been on an economic basis. Claimants having received the benefit of this higher aggregate award on the premise that they were taken over as a going concern, they cannot now claim the higher valuation which would apply to two of the twelve parcels only if the going concern were dismembered by the sale of these two garages.

3. Claimants contend that an allowance for physical wear and tear necessarily includes an allowance for functional obsolescence. But the two items are completely independent.

Let us assume two garages, A and B, both of the same age and both of substantially the same size and construction. However, A had been built as a bus garage, while B

had been built as a trolley barn but had subsequently been converted to a bus garage. Taking reproduction cost less physical wear and tear alone, B would show at least as high a value as A, perhaps even higher because of the additional cost involved in the conversion. Yet obviously A is the more valuable property for an operating bus company.

This self-evident result is reached by deducting little if anything for functional obsolescence in A's case, while deducting a much larger amount in B's case because it is so much less suitable for the purpose for which it is intended. Even in the case of A, which was originally built for the storage and servicing of buses, changes in the size and design of buses might create needs for their storage and servicing for which A would not have the same suitability as a newly constructed garage. This unsuitability would not be taken care of by a deduction for physical wear and tear; it would have to be reflected in a deduction for functional obsolescence.

4. Claimants object that I used a fourteen-year life for the buses, thus adopting in toto the testimony of the City's expert, instead of arriving at a life somewhere between his opinion and the twenty-year life testified to by claimants' expert. Where a court does not wholly agree with either expert, the valuation would naturally fall somewhere between both opinions. But in this case, my observation of the witnesses led to the conclusion that the City's expert had reached the correct result, and that claimants' expert was wide of the mark. Under such circumstances, there is no basis for adopting a compromise figure.

The allowance of a fourteen-year life by the City's expert Roberts is corroborated by other persuasive evidence in the record. Exhibit 228 shows that, of the 19,448 buses owned at the end of 1961, by the nation's 56 largest transit systems reporting to the American Transit Association (excluding claimants), only six per cent had survived to their fifteenth year or beyond. The percentage for the five largest systems was: Chicago Transit Authority, ten per cent of 2,604 buses; Public Service Co-ordinated Transport (New Jersey), one per cent of 2,306 buses; New York City Transit Authority, none of 2,170 buses; Philadelphia Transportation Co., three per cent of 1,290 buses; Detroit Department of Street Railways, three per cent of 929 buses. By way of contrast, twenty-five per cent of claimants' 2113 buses were fifteen or more years old.

The fact that these 532 buses are still in operation does not establish that a fourteen-year life allowance is too short. The bus companies have found that it is more economical to retire buses after fourteen years, rather than to subject themselves to the substantial additional costs of maintenance and operation of the superannuated buses.

5. Claimants object that the salvage value allowed for the buses over fourteen years old does not give as much value to the motors and other usable parts as I assigned to similar items included in the appraisal of fixtures and personal property. The latter items were specifically valued by competent experts, whose testimony as to their condition and usableness I found credible. The parts in the buses were not specifically valued, and there was no way to determine their condition or future utility. In the light of

all the testimony, I accepted Mr. Roberts' opinion of their salvage value. This opinion finds support in the salvage realized by claimants on 45 buses retired in 1960.

6. I find no reason to depart from my original conclusion with respect to the allowance made for depreciation of the personal property other than buses.

7. The opinion stated that the City may not be charged with deferred expenses attributable to obligations assumed by the condemnee prior to condemnation. Claimants contend that this should not apply to their possible liability in respect of the street railway tracks, since such liability (if any) will not arise until they are required to remove the tracks.

No opinion is expressed here as to whether Surface is or will be held liable for removal of the tracks, or for injuries resulting from presence of the rails. But if such liability is ultimately imposed, the basis of it would be the agreement made by Surface when it exchanged its trolley franchises for its bus franchises. This is a pre-existing liability on an exact parity with claimants' liabilities for pension, tort claim administration, and workmen's compensation and liabilities. It is not compensable for the reasons stated in the opinion.

The corporation counsel is directed to submit final decrees in accordance with the foregoing.

APPENDIX G

Claimant's Exhibit EA-1 in *Matter of Port Authority, Trans-Hudson Corporation*, 50 Misc. 2d 613 (1966)

YIELDS, INTEREST RATES, DISCOUNT RATES AND OTHER DATA ON VARIOUS DEBT AND EQUITY INVESTMENTS AS OF VARIOUS DATES

1—Yield on prime long-term (30 yr.) corporate bonds.[1]

1938 ann. av.	1961 ann. av.	Feb. 15, 1966
2.90%	4.32%	4.75%

2—Yield on long-term (over 10 yr.) Treasury bonds.[2]

1938 ann. av.	1961 ann. av.	Feb. 28, 1966
2.56%	3.90%	4.70%

3—Yield on 1 yr. Treasury obligations.[3]

1938	1950 ann. av.	1961 ann. av.	Feb. 28, 1966
NA	1.28%	2.89%	4.91%

4—Yield on high grade long-term (20 yr.) municipal bonds (tax-free).[4]

1938 ann. av.	1961 ann. av.	February 24, 1966
2.58%	3.35%	3.66%

5—Yield on high grade short-term (1 yr.) municipal bonds (tax-free).[5]

1938	1950 ann. av.	1961 ann. av.	Feb. 28, 1966
NA	.75%	1.50%	3.15%

Appendix G cont'd

6—Yield on prime 4-6 mos.. commercial paper.[6]

1938 ann. av.	1961 ann. av.	Feb. 28, 1966
.81%	2.97%	4.88%

7—Yield on prime banker's acceptances.[7]

1938 ann. av.	1961 ann. av.	Feb. 28, 1966
1.6%	2.81%	4.88%

8—Fed. Reserve Bk of N.Y. rediscount rate.[8]

1938	1961	Feb. 28, 1966
1.00%	3.00%	4.50%

9—Bank prime discount rate.[9]

1938	1961	March 11, 1966
1.50%	4.50%	5.50%

10—Yield on Certificates of deposit (secondary market) as of March 14, 1966.[10]

3 mos.—5.25%
6 mos.—5.37%

11—Certificates of deposit (bank rate) as of February 25, 1966.[11]

1 yr. and over—5.25%
6 mos.—1 yr. —5.20%
5 mos.—6 mos.—5.15%
4 mos.—5 mos.—5.10%
3 mos.—4 mos.—5.05%
2 mos.—3 mos.—4.90%

Appendix G cont'd

12—Yield on Federal National Mortgage Ass'n $250,000,000 5.30% Debentures, dated March 10, 1967.[13]

Feb. 24, 1966—5.38%

13—Approximate per cent net change in net assets per share of 30 balanced funds (with capital gains reinvested plus income dividends received in cash).[13]

1965 over 1964	1964 over 1963	1963 over 1962
11.5%	12%	13%

14—Standard & Poor's Index of Industrial Stocks (1941-43 = 10).[14]

	High	Low	Last
1962	75.22	54.80	66.00
1963	79.25	65.48	79.25
1964	91.29	79.74	89.62
1965	98.55	86.73	98.47
Feb. 25, 1966	98.30	96.74	97.50

15—Dow-Jones Industrial Stock Closing Averages.[15]

Dec. 1962—652.10
Dec. 1963—762.95
Dec. 1964—874.13
Dec. 1965—969.26
Feb. 25, 1966—953.00

Appendix G cont'd

[1] Source: Homer, *A History of Interest Rates* (Rutgers Univ. Press 1963), Tables 47 (p. 350) and 49 (p. 359). The averages are based on the method described in Durand, *Basic Yields of Corporate Bonds* (National Bureau of Economic Research Technical Paper #3 1942) with adjustments described by Mr. Homer in footnotes to the tables cited. The yield as of February 15, 1966 has been determined by Mr. Homer based on the Durand method.

[2] Source: Homer, *op. cit. supra,* Tables 48 (p. 352) and 50 (p. 361). The yield as of February 28, 1966, has been determined by averaging the yields on all Treasury bonds with maturities of 10 years or more, as shown in Salomon Brothers & Hutzler Sheet of Closing Trading Quotations on February 28, 1966.

[3] Sources: Salomon Brothers & Hutzler, *An Analytical Record of Yields and Yield Spreads from 1950 Through 1963;* Salomon Brothers & Hutzler, *Bond Market Review,* (March 1, 1966) p. 3. The yields given are an average of yields made by constructing a theoretical yield curve using both bills and coupon obligations. The bond equivalent yield on 1 yr. bills alone as of February 28, 1966, was 5.19%.

[4] Sources: Homer, *op. cit. supra,* Tables 47 (p. 351) and 49 (p. 360); *Bond Buyer* (Feb. 28, 1966) p. 43. The *Bond Buyer* high grade average is an average of 11 municipal issues, with maturities of 20 years, having an average Moody's rating of Aa.

[5] Sources: Salomon Brothers & Hutzler, *An Analytical Record of Representative Municipal Yield Scales by Quality and Maturity 1950 Through June 1965,* Table 1, (pp. 9, 12); Salomon Brothers & Hutzler, *Bond Market Review* (March 1, 1966) p. 7.

[6] Sources: Homer, *op. cit. supra,* Table 51 (p. 365); Salomon Brothers & Hutzler, *Bond Market Review* (March 1, 1966) p. 2.

[7] Sources: Homer, *op. cit. supra,* Table 51 (p. 367); Salomon Brothers & Hutzler, *Bond Market Review* (March 1, 1966) p. 2.

[8] Sources: Homer, *op. cit. supra,* Table 51 (p. 367); *N. Y. Times,* March 1, 1966, p. 52, col. 4.

[9] Sources: Homer, *op. cit. supra,* Table 51 (p. 369); *N. Y. Times,* March 11, 1966, p. 12, col. 6. The prime rate was raised from 5.00% to 5.50% on March 10, 1966.

[10] Source: *N. Y. Times,* March 15, 1966, p. 56, col. 2.

[11] Source: *The Wall Street Journal,* March 1, 1966, p. 15, col. 1.

Appendix G cont'd

[12] Source: *N. Y. Times,* February 24, 1966, p. 54, cols. 2-3.

[13] Source: Investment Companies 1965, p. 123 (Arthur Wiesenberger & Co.) and January 31, 1966 supplement thereto. The thirty funds, which are grouped as "Growth—Income—Stability" funds, are American Business Shares, Axe-Houghton Fund A, Axe-Houghton Fund B, Boston Fund, Channing Balanced Fund, Commonwealth Fund—Plan C, Commonwealth Investment Company, Composite Bond & Stock Fund, Composite Fund, Diversified Investment Fund, Dodge & Cox Balanced Fund, Eaton & Howard Balanced Fund, Fiduciary Mutual Investing Co., General Investors Trust Group Sec.—Fully Administered, Income Foundation Fund, Investors Mutual, Istel Fund, Loomis-Sayles Mutual Fund, Massachusetts Life Fund, Mutual Investment Fund, Nation-Wide Securities Company, New England Fund, Putnam (George) Fund of Boston, Scudder, Stevens & Clark Balanced, Shareholders' Trust of Boston, Stein Roe & Farnham Balanced Fund, Wall Street Investing Corp., Wellington Fund, Whitehall Fund. These funds had aggregate net assets of $7,151,988,446 at the end of 1964. At the close of 1965, the funds had an average of 32.7% of their net assets invested in cash and securities other than common stocks.

[14] Sources: Standard & Poor's; *N. Y. Times,* February 26, 1966, p. 31, col. 4.

[15] Sources: *Dow-Jones 1966 Handbook; N. Y. Times,* February 26, 1966, p. 31, col. 4.

(38,697)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 1095

In the Matter of the Application of THE CITY OF NEW YORK relative to acquiring title to certain real property designated as Lot 10 in Block 439 etc. (5 parcels, Manhattan)—FIFTH AVENUE COACH LINES, INC., and four other proceedings.

FIFTH AVENUE COACH LINES, INC.,
SURFACE TRANSIT INC.,
Appellants,

v.

THE CITY OF NEW YORK,
Respondent.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

MOTION TO DISMISS

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MORRIS HANDEL,
MORRIS EINHORN,
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IN THE

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In the Matter of the Application of THE CITY OF NEW YORK relative to acquiring title to certain real property designated as Lot 10 in Block 439, etc. (5 parcels, Manhattan) —FIFTH AVENUE COACH LINES, INC., and four other proceedings.

FIFTH AVENUE COACH LINES, INC.,
SURFACE TRANSIT INC.,

Appellants,

v.

THE CITY OF NEW YORK,

Respondent.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

MOTION TO DISMISS

Respondent, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves for dismissal of the appeal on the grounds that (1) it does not present a substantial federal question, (2) the judgment rests on an adequate non-federal basis, and (3) the question sought to be reviewed was not properly raised or expressly passed on.

Questions Presented

1. Whether a State statute (New York General Municipal Law, § 3-a), which reflects the relative safety of public

debts by prescribing lower interest rates on condemnation awards than are generally prevalent with respect to private debts, violates due process under the Fourteenth Amendment, particularly where such statutory rates are deemed by State courts to create no more than a rebuttable presumption as to the adequacy of just compensation for delay in payment?

This Court has previously sustained the statute under attack. *A.F. & G. Realty Corp.* v. *City of New York,* 313 U. S. 540 (1941); *aff'g Matter of City of N. Y. (Bronx River Parkway),* 284 N. Y. 48, 701 (1940).

The Question Presented, as posed by Appellants' Jurisdictional Statement (p. 3), erroneously states that the State courts "precluded" appellants from showing that the statutory rate of interest was inadequate.

2. Where the State courts have found, on the evidence presented, that a statutory rate of interest on condemnation awards affords just compensation for delay in payment, is a federal due process question under the Fourteenth Amendment presented?

3. Where a State statute, which creates a rebuttable presumption that 4% interest on a condemnation award affords just compensation for delay in payment, is challenged in this Court as repugnant to due process of law under the Fourteenth Amendment, has that question been properly presented where neither the Federal Constitution nor any provision thereof was expressly invoked and it is simply contended at the trial that such interest rate affords "inadequate compensation as a matter of law and as a matter of fair constitutional rights" (13,550)?*

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* The pages of the record are referred to herein by numbers in parentheses. Appendices referred to are contained in appellants' Jurisdictional Statement.

Statement

This is an appeal from a judgment awarding appellants $30.4 million, plus interest at 4% per annum, for the tangible assets of their bus operations (buses, garages, land, and personalty).

Appellants' property was condemned in March, 1962. Their bus operations in the City of New York had been sustained for years by means of public subsidies to enable them to compete with City-owned rapid transit and bus systems. The award for the value of appellants' property, as originally made by the Trial Court and affirmed by the Appellate Division, embraced all of the property, *i.e.,* inclusive of claimed intangible assets. The $30.4 million award had been predicated entirely upon the *depreciated reproduction cost of the physical assets,* despite *a net investment rate base* of $18.9 million (Appendix E, p. E-16) and a sales value of $20.7 million (Appendix D, p. D-6). The Court of Appeals nevertheless found that award inadequate because it presumably did not admeasure "going-concern value" separately, and in addition to the physical property, and remanded the case for a separate determination thereof.* This, despite the fact that the condemned bus fleets, because of age and debilitated condition, "were incapable of efficient operation," thus requiring multi-million dollar rehabilitation expenditures (Appendix E, p. E-55), as well as additional huge expenditures to meet past incurred, but totally unfunded, pension liability for active personnel (Appendix E, pp. E-72, E-73).**

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* While the valuation issues, and legal questions incident thereto, will not be finally resolved until the pending litigation on "going concern value" is completed, respondent raises no question as to the finality of the judgment for purposes of this appeal on the adequacy of compensation for delay in payment.

** Portions of the record, on both the trial and the retrial, not certified to this Court on the present appeal, show that a minimum of $50 million was required to rehabilitate the condemned property and $58 million to meet past accrued pension fund deficiencies for active personnel.

The statement of some of these background details concerning the basic award, although seemingly irrelevant to the limited issue here presented as to the adequacy of the interest rate, has been necessitated by appellants' attempt to have their pre-condemnation liabilities, for which compensation has been denied, treated as a factor in determining just compensation for delay in payment. Thus, while appellants state that "[a]ll evidence offered by claimants to show that interest of 4% per annum on the award was not adequate to compensate them for delay in payment was excluded" (Jurisdictional Statement, p. 5), the fact is that appellants simply chose to introduce no evidence—although urged by the condemnor to do so if they would preserve an appealable issue (*infra*, p. 7). As a "substitute" for such record proof, appellants inject the extraneous allegation that they were "required" to discharge $19.5 million in "liabilities attributable to their operations as going concerns prior to condemnation," and set forth an itemized list of those alleged liabilities (Jurisdictional Statement, p. 5 fn.). Inasmuch as pre-condemnation liabilities are not assets of value to be reflected in an award for the value of property, and since, on the retrial of the issue of going concern value, appellants are even now urging $19.5 million as "a minimum measure of the value of claimants' going concern assets" (Appellants' Trial Brief, p. 78), appellants' liabilities in that *alleged amount* are clearly irrelevant to the issue presented on the adequacy of interest for delay in payment of the basic award.*

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* The Trial Court's consideration of appellants' claimed liabilities is set forth in Appendix E, pp. E-72 to E-80, and Appendix F, p. F-8.

ARGUMENT

This Court has previously upheld the constitutionality of the statute under attack. The appeal raises no substantial federal question, the judgment appealed from rests on an adequate non-federal basis, and the question was not properly raised or expressly passed on.

(1)

Where property is taken in eminent domain, "it has consistently been held that the Fifth Amendment's reference to 'just compensation' entitles the property owner to receive interest from the date of the taking to the date of payment as part of his just compensation (cases cited)." *United States* v. *Hotel Co.*, 329 U. S. 585, 588 (1947); see also, *Albrecht* v. *United States*, 329 U. S. 599, 602-3 (1947). This Court has already upheld the constitutionality of the statute here under attack (New York General Municipal Law, § 3-a), which affords 4% interest for delay in payment of a condemnation award pending judicial determination of the condemned property's value. Thus, the New York Court of Appeals, in construing the statute, has held that "the lower rates of interest usually applicable" to the borrowings of public debtors are adequate to afford just compensation pending payment of an award. *Matter of City of N. Y. (Bronx River Parkway)*, 284 N. Y. 48, 54-5 (1940); 284 N. Y. 701 (1940), amending remittitur to present questions under the Fourteenth Amendment. This Court affirmed, *sub nom. A. F. & G. Realty Corp.* v. *City of New York*, 313 U. S. 540 (1941), and rejected the contention that the statute violated the Equal Protection and Due Process provisions of the Fourteenth Amendment.

The New York Court of Appeals did not hold in the cited case, nor is it the law in the State of New York, as appellants baselessly contend, that the statutory rate is conclusive and precludes evidence of an appropriate interest rate. The statute has been held to provide, at best, "a rebuttable presumption" as to the adequacy of the rate

therein set forth, and appellants concede this to be an appropriate function of such legislation (Jurisdictional Statement, p. 5). Thus, in the cited leading case, the State Court of Appeals expressly held that evidence as to the inadequacy of the statutory rate could overcome the presumption created thereby, and that only "[i]n the absence of evidence as to what such additional sum should be, interest, as provided by law, meets the constitutional requirement." *Matter of City of N. Y. (Bronx River Parkway), supra,* 284 N. Y. at p. 54. The Court had there expressly pointed out that the "claimants' contention that interest at the rate of four per centum per annum is so unreasonably low as to deprive them of just compensation is not supported by any evidence, and is contrary to common experience" (*ibid.,* at p. 55).

In short, the factual question as to just compensation for delay in payment is not preempted by the statute under attack. This was expressly and recently recognized in *Mtr. of City of N. Y. (Maxwell),* 15 AD 2d 153, 178, 181 (1st. Dept., 1961), aff'd *sub. nom. Matter of City of New York (Schnurmacher Corp.),* 16 NY 2d 497, 828 (1965), rearg. den. 16 NY 2d 834 (1965). It is the opinion in that case to which appellants attribute the Trial Court's alleged error (Jurisdictional Statement, pp. 6-7) in "precluding" them "from showing that actual loss exceeded the statutory rate" (*ibid.,* p. 5). In the *Maxwell* case, however, the Appellate Division found that the higher cost of money to *private debtors,* as opposed to governmental debtors, even "if proven, would not overcome the presumptive applicability of section 3-a." The Court held that the statutory rate "reflects a reasonable balance between return and safety," and that there had been "no offer of proof that the 4% rate unduly favors" municipalities (15 AD 2d, at pp. 181-182). It had not there been shown that the cost of money to municipalities exceeded the statutory rate. As the Court stated, "[c]laimants do not even hint that the municipality, which is the condemnor herein, procured benefits of this nature" (*ibid.,* at p. 182).

The plain fact is that "evidence as to what such additional sum should be" for delay in payment of an award was and is clearly admissible under the law of the State of New York. *Matter of City of N. Y. (Bronx River Parkway), supra.* However, appellants introduced no such evidence. Appellants merely *offered to prove* that the cost of money to them exceeded 4%, that penalty interest on tax delinquencies exceeded 4%, that the cost of money to other private borrowers exceeded 4%, and that "on tax exempt municipals, and on some forms of U. S. Treasury bonds" the interest rate exceeded 4% (13,555-60). Even the offer of proof contained no specifics on the interest paid on the designated government securities. Far from being "precluded" from introducing proof of these alleged facts (Jurisdictional Statement, pp. 3, 4, 5, 12), appellants simply precluded themselves because they could not meet their burden of proof. Indeed, the respondent raised no objection to the actual introduction of appellants' proof, subject only to the right of cross-examination and countervailing proof.

It was the City that, in fact (a) urged upon appellants that they "are entitled under the Lincoln Square and Bronx River Expressway cases to come in with evidence of what a just rate of compensation would be" for delay in payment (13,552), (b) cautioned appellants that without proof of an appropriate rate to be added to the award, appellants "will not have an appealable grievance," and (c) that "the time to establish that grievance is in the court of original jurisdiction" (13,568-9). Appellants conceded that they had merely advanced "a statement of what would be offered in the event that there might be a favorable determination and a remand," and "that this is not proof" (13,553).

In addition, upon the remand by the Court of Appeals "for a determination of the value of the going concern assets as an addition to the amount heretofore awarded" (Appendix B, p. B-9), the retrial was completed without *even an offer to prove* that the statutory rate afforded inadequate compensation for delay in payment. Appellants plainly seek to make their trial record in this very Court. Thus, appellants ask this Court to take judicial notice of

evidence supplied by condemnees in other cases (Jurisdictional Statement, p. 11, citing "Exhibit EA-1 from the *Trans-Hudson* case"), and to judicially notice "that the City of New York has borrowed money at the following rates during 1966," *i.e.*, at rates ranging from 4.18% in January to 4.76% in October (*ibid.*, p. 13). In fact, the clear admissibility of such proof in the courts of the State of New York—when the detailed proof is actually tendered—is apparent from the very illustration invoked by appellants themselves. Thus, in the *Trans-Hudson* case to which appellants refer, the Trial Court found that "[o]f the several years involved here, the proof is satisfactory only as to the year 1966 in establishing the statutorily prescribed 4% interest rate to be unjust." Nevertheless, this was not sufficient to show inadequate compensation for the total period of delay in payment even in that case (*Mtr. of P. A. Trans-Hudson Corp.* v. *H. & M.*, 50 Misc 2d 613, 616 [Sup. Ct., N. Y. Co., 1966], modified 27 AD 2d 32 [1st Dept., 1966]; Jurisdictional Statement, p. 9).

In the instant case, the City pointed out to the Trial Court that appellants' secured creditors, with liens on appellants' real estate and buses, were themselves claimants in the condemnation proceeding, so that their claims were subject to the statutory rate absent proof of its inadequacy (13,581; *cf.* 13,555-8). Consequently, appellants' offer to prove that they would pay such claimants more than the statutory rate during the delay in payment of the award was scarcely of probative worth. Moreover, despite the fact that the City regarded appellants' method of "proof" to be grossly deficient and entitled to no weight whatever, it nonetheless pointed out that adequate compensation for delay in payment of a debt pending its determination was entirely dependent upon the period of delay and the return commonly required for the risk that attaches to the debtor (13,571-2). In brief, the City contended that the short-term obligations of government debtors should weigh heavily with the Court and that, as shown by the daily market quotations for short-term debts of government agencies, "none of them approach four per cent"

(13,573). The Trial Court concluded that "[t]he proof offered would not, in my opinion, overcome the presumptive applicability of Section 3-a and establish that the four per cent rate unduly favors municipalities" (13,582). *Cf. Hartford National Bank and Trust Co.* v. *E. F. Drew & Co.*, 188 F. Supp. 347, 349-50 (D. C., D. Del., 1960), aff'd 290 F. 2d 589 (C. A. 3d, 1961).

On the basis of the record that appellants chose to make in the instant case, without any objection from the condemnor or the Court as to the admissibility of proof in support of any theory deemed appropriate by appellants, the Trial Court's finding of fact as to the adequacy of compensation for delay in payment of the award presents no substantial federal question. *Joslin Co.* v. *Providence*, 262 U. S. 668, 677 (1923); *Matter of City of N. Y. (Bronx River Parkway)*, 284 N. Y. 48, 701 (1940), aff'd *sub. nom. A. F. & G. Realty Corp.* v. *City of New York*, 313 U. S. 540 (1941); *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 311 (1902); *Zucht v. King*, 260 U. S. 174, 176 (1922); *Fry Roofing Co.* v. *Wood*, 344 U. S. 157, 160 (1952).

(2)

To obscure the fact that they had provided no evidentiary basis for any finding as to the inadequacy of the statutory rate, appellants repeatedly charge that there had been a "holding that New York General Municipal Law § 3-a * * * precluded Appellants from showing that the said 4% statutory interest rate would not compensate them for the delay in payment of the award" (Jurisdictional Statement, p. 3; also, pp. 4-5). Appellants conclude that "[t]he holding by the New York Court of Appeals herein that the New York General Municipal Law § 3-a * * * precludes a showing of actual damages for delay in payment is in direct contravention of its constitutional duty" (Jurisdictional Statement, p. 12).

Far from having thus "contravened" its constitutional duty, or having reversed its prior ruling in *Matter of City*

of N. Y. (Bronx River Parkway), supra, as appellants would have this Court believe, appellants' baseless contention simply seeks to becloud the fact that the Court of Appeals' affirmance of the adequacy of compensation for delayed payment in this case was wholly predicated upon adequate non-federal grounds, namely, that appellants' "proof" was insufficient to overcome the presumptive applicability of the statute.* *Murdock* v. *City of Memphis,* 20 Wall. (87 U. S.) 590 (1874); *Lynch* v. *New York,* 293 U. S. 52, 54-55 (1934); *Fry Roofing Co.* v. *Wood,* 344 U. S. 157, 160 (1952); see *Stern & Gressman, Supreme Court Practice,* §§ 3-31, 3-32 (3d Ed., 1962), pp. 105-108. It is for this reason that in their motion to amend the remittitur so as to finalize the award, prior to retrial on the issue of going concern value, appellants made no request for clarification of the grounds of decision on the adequacy of compensation for delayed payment, as had been expressly done, for example, in *Matter of City of New York (Schnurmacher Corp.),* 16 NY 2d 828 (1965). See *Herb* v. *Pitcairn,* 324 U. S. 117, 128 (1945); STERN & GRESSMAN, *op. cit. supra.* § 3-29, pp. 102-104.

(3)

Appellants assert that their attack upon the statute as repugnant to due process under the Fourteenth Amendment

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*That the New York Court of Appeals repudiates any legislative prescription of just compensation was made quite evident when the Court, in this very case, expressly stated that the legislature had no right "to say what compensation shall be paid, or even what shall be the rule of compensation" (Appendix B, p. B-1). Thus, despite a net investment rate base of $18.9 million (Appendix E, p. E-16), heavy reliance upon City subsidies for an "earning capacity" (Appendix B, p. B-14), and a total value of $21.6 million for the entire enterprise as a *profitable entity* pursuant to the capitalization of earnings method suggested by the Legislature (N. Y. Condemnation Law, § 5-a; L. 1952, ch. 508, § 1), the lower Courts fixed the award at $30.4 million for an enterprise found *lacking in earning capacity* (Appendix D, p. D-2). The Court of Appeals held that award adequate for the physical property alone, remanding the case for retrial on the question of intangible or going concern value.

"was raised before, and rejected by, each of the lower courts" (Jurisdictional Statement, p. 3). The fact is that when the issue as to compensation for delay in payment was presented in the Trial Court, appellants did not contend that General Municipal Law, § 3-a, was repugnant to the Constitution of the United States. Appellants simply urged upon the Trial Court that, if it awarded no more than four per cent for delay in payment, it would constitute "inadequate compensation as a matter of law and as a matter of fair constitutional rights" (13,550). It is respectfully submitted that, particularly when a statute previously sustained by this Court on the constitutional grounds here urged (284 N. Y. 701) is again attacked as violative of the Fourteenth Amendment, an express and specific identification of the federal question allegedly being raised must be made if a Trial Court is to be expected to consider the question anew. *New York Central R'd Co.* v. *New York*, 186 U. S. 269, 272-3 (1902); *Bryant* v. *Zimmerman*, 278 U. S. 63, 67-68 (1928); *Ford Motor Co.* v. *Pace*, 364 U. S. 444 (1960); Revised Rules of the Supreme Court of the United States, Rules 15, subd. 1 (d), 23, subd. 1 (f); see STERN & GRESSMAN, *op cit. supra*, § 3-26, pp. 92-93; § 3-27, pp. 94-95; § 5-21, p. 198.

CONCLUSION

The motion to dismiss the appeal from the judgment of the New York Court of Appeals should be granted.

March 16, 1967.

Respectfully submitted,

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SUPREME COURT, U. S.
APR 7 1967
JOHN F. DAVIS, CLE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1095

In the Matter of the Application of THE CITY OF NEW YORK relative to acquiring title to certain real property designated as Lot 10 in Block 439, etc. (5 parcels, Manhattan)—FIFTH AVENUE COACH LINES, INC., and four other proceedings.

FIFTH AVENUE COACH LINES, INC.,
SURFACE TRANSIT INC.,

Appellants,

—v.—

THE CITY OF NEW YORK,

Respondent.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

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THE CITY OF NEW YORK,

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ON APPEAL FROM THE NEW YORK COURT OF APPEALS

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

Respondent's Motion to Dismiss includes many factual assertions which are totally irrelevant to the simple issue presented by this appeal (Motion to Dismiss, pp. 3, 4 and 10). We will not attempt to refute such assertions but will confine this reply to the legal issues raised.

Respondent's Motion to Dismiss is based on the following arguments:

(1) The appeal does not present a substantial federal question because "this Court has previously sustained the statute under attack" (Motion to Dismiss, pp. 2, 5).

(2) The question sought to be reviewed was not properly raised or expressly passed on in the lower courts because: (a) appellants "chose to introduce no evidence" that interest at 4% per annum was not adequate to compensate them for delay in payment of the award (Motion to Dismiss, pp. 4, 7-9); and (b) appellants did not "expressly invoke" the due process clause of the Fourteenth Amendment of the Federal Constitution when they contended in the lower courts that New York General Municipal Law (McKinney 1965) §3-a was unconstitutional (Motion to Dismiss, pp. 2, 10-11).

(3) The judgment rests on an adequate nonfederal basis because it rests solely on a "finding of fact as to the adequacy of compensation for delay in payment" (Motion to Dismiss, pp. 9, 2, 6-10).

We consider these contentions in order.

(1)

The Issue Now Raised Has Never Been Passed Upon By This Court.

Respondent contends that the appeal herein "raises no substantial federal question" because this Court has previously upheld the constitutionality of New York General Municipal Law (McKinney 1965) §3-a (Motion to Dismiss, pp. 2, 5). The sole case cited is *Matter of City of N. Y. (Bronx River Parkway)*, 284 N. Y. 48 (1940), *aff'd sub nom., A. F. & G. Realty Corp.* v. *City of New York*, 313 U. S. 540 (1941).

That case is inapposite because although this Court considered New York General Municipal Law (McKinney

1965) §3-a in the *Bronx River Parkway* case, it did not consider the only issue raised herein. The mere fact that a statute is once upheld by this Court on one ground does not forever immunize it from constitutional attack on other grounds. An appeal is precluded only where "the question on the merits is not open to possible contention because it has previously been so specifically and adversely ruled on by this Court as to absolutely foreclose further contention on the subject." *Equitable Life Assurance Society of the United States* v. *Brown*, 187 U. S. 308, 311 (1902); STERN & GRESSMAN, SUPREME COURT PRACTICE §3-25, p. 91 (3d ed. 1962).

Appellants' contention here is that §3-a as applied in this case violated the due process clause of the Fourteenth Amendment because it precluded appellants from recovering more than the 4% statutory interest rate even though it was undisputed that that rate would not adequately compensate them for the delay in payment of the condemnation award.

The contentions in *Bronx River Parkway* were entirely different. They were: first, that the condemnees' property had been seized prior to the enactment of §3-a and therefore that section could not be retroactively applied to limit compensation for delay in payment to 4% of the award;* second, that since the interest rate payable to

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* Thus, each of the first four questions presented in the *Bronx River Parkway* case referred to the fact that §3-a had been enacted after seizure of the condemnees' property. The questions in *Bronx River Parkway* were (Appellants' Statement as to Jurisdiction, pp. 17-18):

(1) May a state by legislative enactment provide that the part of an owner's right to just compensation represented by the interest on the award from the date of vesting of title to the date of payment, shall be fixed at a rate less than the rate in effect when title vested in the condemning authority?

(2) Does not an owner whose property has already been taken from him by the state but who has not as yet been paid have the

the condemnees was less than what it would have been if some party other than a municipality had been the condemnor, the statute violated the equal protection clause.*

In the instant case, appellants' property was seized well after the enactment of §3-a and appellants have not raised any question under the equal protection clause of the Fourteenth Amendment. Accordingly, there is no basis for respondent's contention that the *Bronx River Parkway* case precludes this Court from considering the issue now raised by appellants.

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right to just compensation determined factually as of the date of taking and in accordance with the state statutes in effect when title vested therein?

(3) Does not the owner in a state condemnation proceeding, wherein on the date of vesting of title the statutes provided that interest at the legal rate (then six *per centum* per annum) should be added to the award from the date of vesting of title as part of his just compensation?

(4) In view of the United States Supreme Court's decisions holding that the right to just compensation, including interest, is an implied contract in fact, does not the assailed statute impair the contract existing as of the date of vesting of title?

* The fifth and last question certified in *Bronx River Parkway* related to an alleged violation of the equal protection clause of the Fourteenth Amendment. It was (Appellants' Statement as to Jurisdiction, p. 18):

(5) Can the state decree that in takings wherein it or its municipalities are the condemnors, the proper or fair rate of interest in a just compensation proceeding shall be less than what it would be if some other parties were the condemnors? Can the fair or proper measure of compensation for the same property fluctuate with the identity of the condemnor?

(2)

The Question Sought to Be Reviewed Was Properly Raised and Expressly Passed On.

(A) Appellants' Offer of Proof in the Trial Court Properly Raised the Constitutional Issue.

Respondent contends that because appellants proceeded in the trial court by the route of an offer of proof rather than by actually adducing evidence, they are somehow barred from raising the constitutional issue in this Court (Motion to Dismiss, pp. 4, 7-9). But respondent nowhere contends and has never contended, that this manner of raising the issue in the state courts was improper as a matter of state procedure. Under the circumstances, the fact that appellants proceeded by an offer of proof does not prevent this Court from considering the issue thereby raised. The manner of raising the constitutional issue in the state courts can only preclude an appellant from raising the issue in this Court where the issue was not raised below in accordance with state procedure. STERN & GRESSMAN, *op cit. supra* §3-25, *et seq.*, HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM p. 500 (1953).

The trial court herein held that appellants could proceed by an offer of proof (13552-3). Respondent did not contend that such method was improper as a matter of state procedure. On the contrary it accepted this procedure (13552), and admitted as much in its briefs to the Appellate Division and the Court of Appeals, stating: "Both the City and the Trial Court accepted this method of presenting the issue." (Respondent's Main Brief to the Appellate Division, p. 268; Respondent's Main Brief to the Court of Appeals, p. 196).

The context in which the offer of proof was made makes clear why no objection was raised. The Appellate Division, in affirming a decision of the very trial judge before whom the offer of proof was made herein, had stated with respect to a similar offer of proof in *Matter of City of New York (Maxwell)*, 15 App. Div. 2d 153, 178, 181 (1st Dep't 1961), *aff'd sub nom., Matter of City of New York (Schnurmacher Corp.)*, 16 N. Y. 2d 497, 828 (1955):

> "[T]hese statements and others of like purport, if proven, would not overcome the presumptive applicability of section 3-a."

Under these circumstances, claimants proposed, and respondent and the Trial Court agreed, that in order to save time claimants proceed by offer of proof and that only in the event of a reversal on this issue, would evidence be adduced (13552-3).*

(B) Appellants Raised the Constitutional Issue With Sufficient Specificity in the Trial Court.

Respondent also urges that this issue was not properly raised because in the Trial Court, appellants did not "expressly invoke" the due process clause of the Fourteenth Amendment in contending that New York General Munic-

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* Respondent also points to the fact that, in the remanded proceedings ordered by the Court of Appeals, appellants failed to make "even an offer to prove that the statutory rate afforded inadequate compensation for delay in payment" (Motion to Dismiss, p. 7). No such offer was necessary. It had been made at the first trial when it should have been made and, in any event, the only purpose of the remand was to determine "the value of the going concern assets as an addition to the amount heretofore awarded." *Matter of City of New York (Fifth Avenue Coach Lines, Inc.)*, 18 N. Y. 2d 212, 224 (1966). Obviously, an offer of proof in the remanded proceedings could not affect compensation for the delay in payment of the award for the tangible property, the only issue before this Court.

ipal Law (McKinney 1965) §3-a was unconstitutional as applied (Motion to Dismiss, pp. 2, 10-11).

But this Court has never held that the particular clause of the Federal Constitution must be "expressly invoked" in order properly to raise the constitutional issue in the state courts, where the record shows that the state court was directed to the constitutional question. The applicable rule was stated in *Bryant* v. *Zimmerman*, 278 U. S. 63, 67 (1919):

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

The record herein clearly demonstrates that the federal question was "brought to the attention of the state court with fair precision and in due time."

Appellants' counsel contended in the Trial Court that interest at 4% in this case would be "inadequate compensation as a matter of law and as a matter of fair constitutional rights" (13550), and specifically referred to two opinions in the *Lincoln Square* case where the precise issue now before this Court was discussed. (See 13550-51 referring to *Matter of City of New York (Lincoln Square Slum Clearance Project)*, 22 Misc. 2d 609 (Sup. Ct. N. Y. County 1959) and *Matter of the City of New York (Maxwell)*, 15 App. Div. 2d 153, 178-182 (1st Dep't 1961).) The

court in the *Lincoln Square* case had described the contention of claimants as follows (22 Misc. 2d at 610):

> "Claimants urge that I should disregard this statute upon the ground that, during the period from February 28, 1958 (title vesting date) to the entry of the final decree, the 4% rate is factually insufficient to meet the constitutional guarantee of just compensation required by the due process clause of the Fourteenth Amendment of the Federal Constitution, and by section 7 of article I of the New York State Constitution."

Except for the vesting date, this statement could have equally well described appellants' federal constitutional contention herein.

And that court had rejected the contention in the following language (22 Misc. 2d at 611):

> "There is no constitutional requirement that just compensation for delay in making payment must be exactly equal to 'the fair rate of interest for the use of money in the open money market in New York City where money is borrowed without collateral and where the lender does not receive income tax benefit,' the test urged by claimants. It is probably true that such rate is higher today, and has been since February, 1958, than it was in 1939, when this statute was first enacted. Yet in 1956 the Legislature, knowing that the legal rate of interest was 6%, reiterated its mandate that the city should pay only 4% on a condemnation award."

The judge who wrote both of the above-quoted excerpts in the *Lincoln Square* case was the very judge before whom the instant proceeding was tried. This record clearly shows that he understood that he was deciding a federal

constitutional question under the due process clause of the Fourteenth Amendment for he stated in rejecting appellants' contention herein (13582):

> "The reasons for this determination are set forth in the decision on similar claims I made in Matter of the City of New York (Lincoln Square Slum Clearance Project), 22 Misc. 2d 609, and those stated by Presiding Justice Botein in his affirmance opinion in 15 A. D. 2nd, 153."

Thereafter, as we have shown in our Jurisdictional Statement (p. 8), the issue was specifically raised and argued by appellants herein in the Appellate Division and the Court of Appeals. Surely, appellants were not required to do more to preserve the issue for consideration by this Court.

(3)

The Courts Below Necessarily Determined the Federal Question of the Constitutionality of Section 3-a As Applied Herein.

Respondent contends that the judgment appealed from is based solely upon an adequate nonfederal ground, "a finding of fact" that "appellants' 'proof' was insufficient to overcome the presumptive applicability of the statute" (Motion to Dismiss, pp. 5, 10). This statement is entirely erroneous. There was no "finding of fact" on the issue because there was never a factual issue relating to interest in this case.* It is undisputed on this record

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* To fully reveal the absurdity of the contention that the lower courts' holdings were merely "factual findings", we need only recall one of the reasons why both the Trial Court and the Appellate Division in the *Lincoln Square* case held that the statutory rate of 4% was fair compensation for use of the condemnee's funds. These courts stated that the City

that appellants have been forced to accept 4% simple interest *per annum* during a four and one-half year period when (a) they could have earned considerably more than 4% in the then prevailing money market (13559-60) and (b) they were required to borrow money at rates considerably higher than 4% (13551-9).

Moreover, even if it could fairly be stated that there was a "finding of fact" as to the adequacy of 4% simple interest *per annum* to compensate appellants for the delay in payment of their award, this Court would not be deprived of jurisdiction. For appellants submit that any state law which would permit such a "finding of fact" on this record is unconstitutional and that regardless of nomenclature—whether the holdings of the lower courts are called "findings of fact", "findings of law" or "mixed findings of fact and law"—the effect of these holdings was to deny appellants compensation exceeding 4% simple interest *per annum*, even though the undisputed facts showed that 4% was inadequate.

Respondent also contends that the "reason" why appellants did not request clarification of the remittitur of the Court of Appeals herein was that the Court of Appeals' affirmance "was wholly predicated upon adequate non-federal grounds" (Motion to Dismiss, p. 10). In fact, no such clarification was necessary in this case. In the *Lincoln Square* case, it will be recalled, the condemnees raised the

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of New York, the condemnor herein, had been "classified" by the New York Legislature as a "favored debtor". See *Matter of City of New York (Lincoln Square Slum Clearance Project)*, 22 Misc. 2d 609, 611-12 (Sup. Ct. N. Y. County, 1959), *aff'd, Matter of City of New York (Maxwell)*, 15 App. Div. 2d 153, 178, 182 (1st Dep't 1961). Such a "classification" necessarily amounts to a conclusive presumption that 4% is fair compensation because no proof showing the *condemnees'* losses resulting from inadequate interest could overcome (or would even be relevant to) the "classification" of the *condemnor* as a "favored debtor" and the consequent "finding" that 4% is fair compensation.

identical issue raised by appellants herein (p. 8, *supra*) and also did so by an offer of proof (p. 6, *supra*).

In *Lincoln Square,* the condemnees moved the Court of Appeals to clarify its remittitur to show that a federal question had been presented and passed upon. The Court of Appeals granted the motion stating, *Matter of City of New York (Schnurmacher Corp.),* 16 N. Y. 2d at 828:

> "Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Movants-appellants contended that the application of section 3-a of the General Municipal Law to a judgment or accrued claim arising out of a condemnation proceeding deprived them of their right to just compensation and contended that they received less than just compensation with regard to damage parcels 27 and 412, all in violation of their rights under the Fifth and Fourteenth Amendments of the Constitution of the United States. The Court of Appeals held that appellants' constitutional rights had not been violated. [See 16 N. Y. 2d 497.]"

In view of the identity of the issues raised and procedure followed in this case and *Lincoln Square,* and the fact that the constitutional question was raised and argued in all three state courts, no clarification of the remittitur herein was necessary to show that a federal question had been properly presented and was passed upon.

CONCLUSION

The Motion to Dismiss should be denied and this Court should either reverse the decision below or else note probable jurisdiction of the appeal.

Respectfully submitted,

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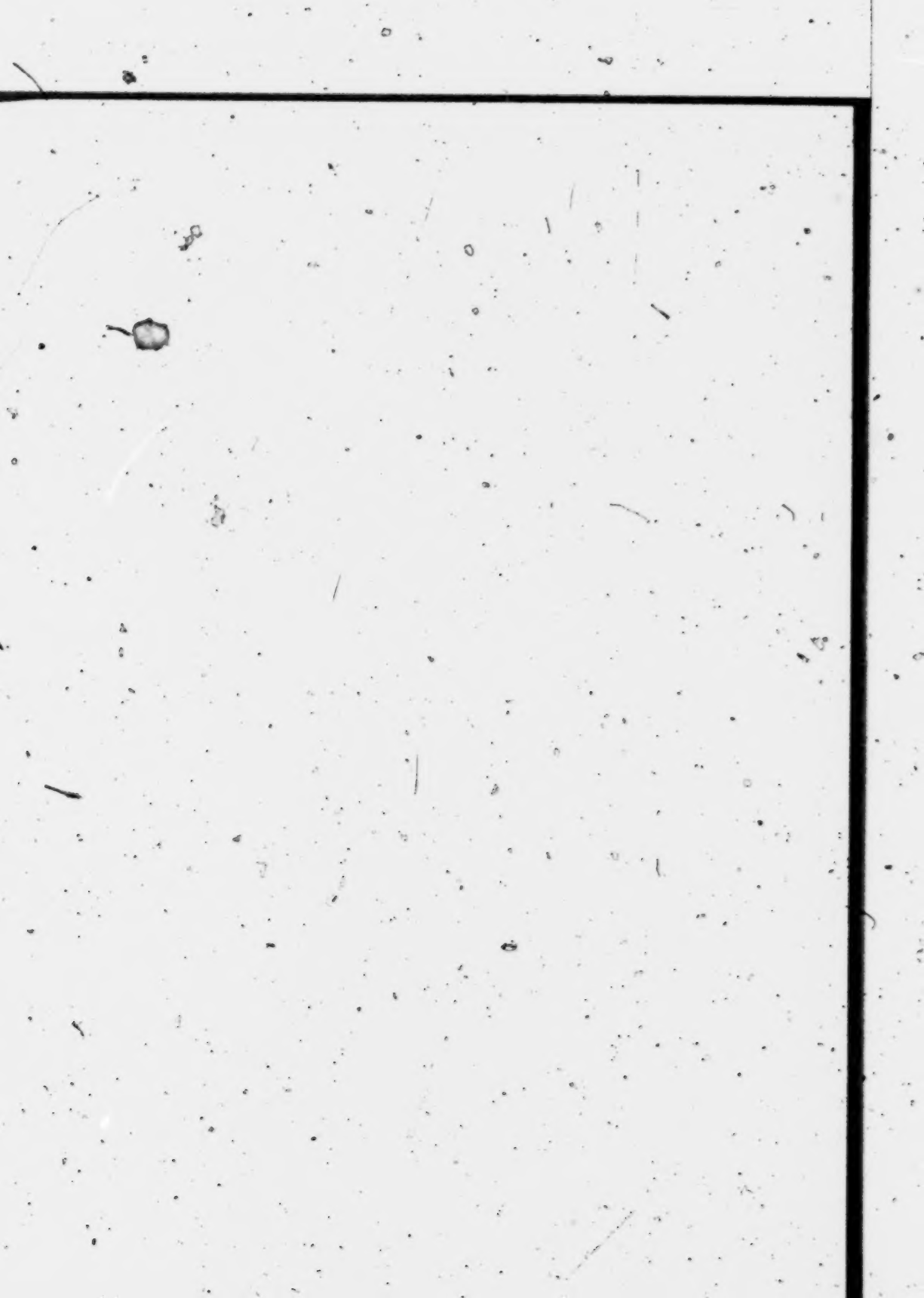

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

FIFTH AVENUE COACH LINES, INC., ET AL. *v.* CITY OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 1095. Decided May 8, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.